SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 591.

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

SUDA REYNOLDS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May term, 1918, of said court before the Honorable Walter H. Sanborn, circuit judge, and the Honorable Jacob Trieber and the Honorable Frank A. Youmans, district judges.

Attest:

[SEAL.] E. E. KOCH,

Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the fifth day of July, A. D. 1917, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Oklahoma, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Suda Reynolds was appellant and the United States of America was appellee, which said transcript as prepared, printed, and certified by the clerk of said District Court in pursuance of an act of Congress approved February 13, 1911, is in the words and figures following, to-wit:

2 CITATION.

In the District Court of the United States in and for the Western District of Oklahoma.

SUDA REYNOLDS, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

UNITED STATES OF AMERICA,

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States District Court for the Western District of the State of Oklahoma, wherein Suda Reynolds is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John H. Cotteral, judge of the United States District Court for the Western District of Oklahoma, this 12th day of May, A. D. 1917.

JOHN H. COTTERAL,
Judge of the District Court.

Service of the above citation is hereby accepted this 12th day of May, 1917.

JOHN A. FAIN,
United States Attorney for the Western District of Oklahoma.

Endorsed: Filed in District Court May 12, 1917.

3 In the district court of the United States for the Western District of Oklahoma.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SUDA REYNOLDS, DEFENDANT.
No. 221. In Equity.

BILL OF COMPLAINT.

The United States of America, plaintiff, by John A. Fain, United States attorney for the Western District of Oklahoma, and Lal D. Threlkeld, assistant United States attorney for said district, at the request of the Secretary of the Interior and under the direction of the Attorney General of the United States, brings this, its bill of complaint, against Suda Reynolds, and complains and says:

That the defendant, Suda Reynolds, is a citizen of the United States and State of Oklahoma, and is a resident of Pottawatomie County in the Western District of the State of Oklahoma;

That the plaintiff brings this action in its own behalf and in behalf of James Washington, Walter Washington, Willie Washington, Claudius Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Washington Rolette, Fannie Washington Daugherty, Rose Washington McLennon, and Minnie Chisholm, heirs and only heirs of Stella Washington, deceased Absentee Shawnee Allottee No. 9, a member of the Absentee Shawnee Tribe of Indians in Oklahoma;

That herefore, to wit, on or about the 6th day of February, A. D. 1892, United States of America, by and through its proper officers and agents, and pursuant to treaty and the act of Congress ratifying the same, caused to be deposited in the General Land Office of the United States a schedule of allotments of land, dated the 7th day of August, 1891, from the Acting Commissioner of Indian Affairs, approved by the Secretary of Interior on the 16th day of Sep-

4 tember, 1891, whereby it was shown that under the provisions of the act of Congress approved February 8, 1887 (24 Stat., 388), as amended by the act of Congress of March 3, 1891, Stella Washington, Absentee Shawnee Allottee No. 9, had been allotted the following described land, to wit:

The northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north of range five (5) east I. M., Pottamatomie County, Oklahoma;

That upon said day, to wit, the 6th day of February, 1892, a trust patent was issued to the said Stella Washington for said tract of

land, containing a provision under the law then in force, that the United States of America did and would hold the land thus allotted in trust for the said Stella Washington and, in case of her death, for her heirs, for a period of twenty-five years, at the expiration of which time the United States would convey the same by patent in fee to said Indian, or her heirs, as aforesaid, unless said trust period had been by the President of the United States extended for a longer period, discharged of said trust and free of all charges and incumbrances whatsoever;

That thereafter, to wit, on or about the ------ day of ----------, 1911, the said Stella Washington departed this life, leaving as her only heirs at law under the statutes of the State of Oklahoma the following-named parties and individuals, to wit: James Washington, Walter Washington, Willie Washington, Claudius Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Washington Rolette, Fannie Washington Daugherty, Rose Washington McLennon, and Minnie Chisholm, which fact was so found and adjudged by the Secretary of the Interior under the law then in force;

That, as such heirs and only heirs of the deceased allottee aforesaid, the above-named parties inherited of and from said allottee the northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north of range five (5) east I. M., Pottawatomie County, Oklahoma, which said tract of land the United States of America still holds in trust for the said heirs of the deceased allottee under and by virtue of the fact that Honorable Woodrow Wilson, President of the United States, did, on November 24, 1916, by Executive order duly made and proclaimed, and in pursuance of the acts of Congress hereinbefore referred to, extend for a period of ten years the trust period so described and set out in the trust patent hereinbefore referred to.

That thereafter, and on or about the 17th day of February, 1917, Claudius Tyner, one of the heirs aforesaid, attempted to sell and convey his undivided one-eleventh interest in the above-described tract of land to the defendant, Suda Reynolds, and pursuant thereto did make and deliver a purported warranty deed of conveyance, purporting to convey said undivided interest to the defendant, Suda Reynolds.

That the said purported conveyance was filed for record in the office of the register of deeds (now county clerk) of Pottawatomie County, Oklahoma, on the 18th day of April, 1917.

Plaintiff alleges that said conveyance is null and void and of no force and effect, because of the fact that the title is held in trust by the plaintiff so as aforesaid, and the restriction of twenty-five years as extended has not expired, and the honorable Secretary of the Interior has not approved said attempted conveyance.

Plaintiff alleges that thereafter, to-wit, on or about February 26, 1917, the said defendant, Suda Reynolds, by and through her attorneys, Goode & Johnson, filed in the office of the clerk of the Superior Court of Pottawatomie County, State of Oklahoma, her peti-

tion asking that the land hereinbefore described be partitioned and that the undivided one-eleventh interest purporting to have been purchased by her from the said Claudius Tyner be set off to her in severalty, and is at this time, by and through her attorneys aforesaid, prosecuting said action. A copy of said petition is filed herewith as a part hereof, and marked "Exhibit A";

Plaintiff alleges that the purported conveyance hereinbefore mentioned, and the record thereof, and the claim and suit of the defendant as the owner thereof, constitutes a cloud upon the title of the plaintiff and likewise of said heirs at law, and prevents and will prevent the plaintiff from conveying said land to the aforesaid heirs by good and sufficient patent in fee simple, discharged of the trust, and free of all charges and incumbrances whatsoever, unless this said pretended conveyance is cancelled and held for naught; and further

6 that by the wrongful act of the defendant in securing said purported conveyance and in filing and prosecuting the action now pending in the Superior Court of Pottamatomie County, Oklahoma, the plaintiff, its agents and officers, are resisted, restricted, and interfered with in the control and management of said tract of land and keeping the same for the use of said Indian heirs as it is the purpose and duty of the Government to do, and are thereby hindered in performing its duties and executing the laws and treaties with respect thereto.

Wherefore, to the end that plaintiff may have the relief to which it is entitled, and which it can only obtain in a court of equity, there being no adequate remedy at law, and that said defendant may answer the premises, but not upon oath or affirmation, an answer under oath being hereby expressly waived by plaintiff the plaintiff prays this honorable court that the said conveyance mentioned be set aside, annulled, cancelled, and held for naught; and that said defendant be further restrained and enjoined from setting up any claim, lien or title, or claiming any estate, right, title or interest in or to the said allotment above described, or to the possession of said tract of land, or any part thereof; and that plaintiff be decreed to be the owner thereof for the purposes aforesaid, and entitled to the possession of said tract of land, subject only to the rights of the said heirs, to-wit, James Washington, Walter Washington, Willie Washington, Claudius Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Washington Rolette, Fannie Washington Daugherty, Rose Washington McLennon, and Minnie Chisholm; and that the said defendant, her agents and servants, be enjoined from any other or further conveyance of said land, or the occupation thereof and from negotiating with or procuring from said heirs any other or further deed, mortgage, contract or conveyance, or incumbrance of any kind or character touching any of the undivided interests of said land, or any part of the same, except such as may be approved by the honorable Secretary of the Interior; and that said defendant, her agents and servants, until the final trial of this cause, be restrained and enjoined from in any way or manner further prose-

cuting her said action now pending in the Superior Court of Pottawatomie County, State of Oklahoma, seeking to have said land partitioned and divided in severalty, and from in any way or manner interfering with the control of said land by the United States
7 Indian superintendent duly accredited with authority thereover; and that the plaintiff may have such other and further relief in the premises as the nature, facts and circumstances of the case may require; and that upon the trial of this cause this injunction be made perpetual; and may it please your honor, if the defendant fails to plead hereto voluntarily, to grant this plaintiff a writ of subpoena directed to the said Suda Reynolds, commanding her at a certain time and under a certain penalty thereunder to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform, and abide by such other direction, and decree as may be made against her in the premises as shall seem meet and agreeable to equity; that the plaintiff recover from said defendant its costs herein expended, and such other and further relief as to the court seems just and equitable.

JOHN A. FAIN,
United States Attorney.

----------,
Assistant United States Attorney.

EXHIBIT A.

STATE OF OKLAHOMA, POTTAWATOMIE COUNTY, *ss:*

In the Superior Court in and for the said county and State.

SUDA REYNOLDS, PLAINTIFF, *vs.* JAMES WASHINGTON, WALTER WASHINGTON, CLAUDIUS Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Rolette, Fannie Daugherty, Rose Washington McClennon, Willard Johnston, guardian of Willie Washington, a minor, Minnie Chisholm, a minor, and Henry Chisholm, defendants.	Petition.

Comes now the plaintiff and for cause of action against the defendants, alleges and states:
8 1st. That she is the owner of the legal and equitable title to an undivided 1-11 interest in and to the following described real estate, to wit: The northwest quarter of the southwest quarter of section 31, township 11, north, range 5 east of the I. M. in Pottawatomie County, Oklahoma, containing [forth] acres.
2nd. That she is the owner of such interest under and by virtue of

a warranty deed executed on the 7th day of December, 1916, by Claudius Tyner conveying said interest unto this plaintiff; that said described tract of land was allotted to one Stella Washington, as a member of the Absentee band of Shawnee Indians, and said allotment was approved on the 16th day of September, 1891, and by the terms of said allotment the same was held in trust for the said Stella Washington, or her rightful heirs in the case of her decease, for a period of twenty-five years; that said period expired September 17th, 1916, and at the expiration thereof the same was vested in fee simple in the said Stella Washington or her heirs.

3rd. That the said Stella Washington died in Pottamatomie County on the ---- day of ------, 1911, and her estate has been fully administered and all debts and obligations chargeable thereto fully paid and satisfied. That the said Stella Washington was married to one Wakolle but prior to her death the said Stella Washington obtained a divorce because of the fault of the said Wakolle from her said husband and at her death left no surviving husband and no children, or issue of any children, nor father nor mother; that she left surviving eleven brothers and sisters, each of whom inherited an undivided 1-11th part of said described tract of land, to wit: James Washington, Walter Washington, Willie Washington, a minor, whose legal guardian is Willard Johnston, of Shawnee, Oklahoma, Claudius Tyner, Charley Tyner, Mary Washington, Ella Washington, Hattie Rolette, formerly Hattie Washington, Fannie Washing- formerly Fannie Washington, Rose Washington, who since the death of Stella Washington has intermarried with one McLennon, and Nannie Washington, who thereafter cohabited with one Henry Chisholm, and by whom she had one child, to wit: Minnie Chisholm; that the said Nannie Washington died on the ---- day of ------, 1914, unmarried and without issue save the said Minnie Chisholm.

9 4th. That each and all of the above-named persons was vested with an undivided 1-11th interest in the said real estate as above set forth with the exception of the said Nannie Washington, whose interest de'cended to her heirs, and affiant alleges that Minnie Chisholm is her sole and only heir; that the said Minnie Chisholm is a minor and has no legal guardian appointed for her person or estate; that each and all of said defendants are tenants in common with plaintiff in said premises and no other person has any interest or lien in or right to said premises, and this plaintiff is entitled to receive a distributive share of said above-described land and desires the same to be set off to her in severalty.

5th. That by reason of the number of heirs and their interests therein it will be impracticable to partition or set off the interest of each in said premises.

Wherefor plaintiff prays the court that partition may be made of said land and her interest be set off to her in severalty.

GOODE & JOHNSON,
Attorneys for the Plaintiff.

3300.

COPY.

SUDA REYNOLDS

vs.

JAS. WASHINGTON.

PETITION.

Filed in Superior Court February 26, 1917, Pottawatomie County, Oklahoma, R. L. Flynn, court clerk.

GOODE & JOHNSON,
Attorneys for Plaintiff.

Endorsed: Filed in District Court April 4, 1917.

10 ORDER TO SHOW CAUSE.

Upon presentation and consideration of the bill of complaint in the above-entitled suit, and further good cause shown, it is ordered that the above-named defendant, Suda Reynolds, be and appear in this court at Oklahoma City, Oklahoma, on the 11th day of April, 1917, at the hour of nine o'clock a. m., then and there to show cause, if any she can, why a writ of injunction should not issue in this cause, enjoining and restraining said defendant, Suda Reynolds, her agents, servants, and employees, from in any manner or by any means interfering with the complete and exclusive control by the plaintiff, through its agents and officers, of the following described land, to wit:

The northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north, of range five (5) east, I. M., Pottawatomie County, Oklahoma, and enjoining her, her agents, servants, and employees from interferring with the superintendent and special disbursing agent of the Shawnee Indian agency in the performance of his duties with respect to said land;

That a copy of said bill of complaint be served upon the defendant in this case, together with a copy of this order, certified under the hand of the clerk and seal of this court, by the United States marshal of this district, or by some person acting on behalf of the plaintiff, and if such service is made by a person other than said marshal proof of such service shall be by affidavit of the server filed herein.

Dated this 4th day of April, 1917.

JOHN H. COTTERAL,
District Judge.

Endorsed: Filed in District Court April 4, 1917.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SUDA REYNOLDS, DEFENDANT.
} No. 221. In Equity.

ORDER TO SHOW CAUSE.

Upon presentation and consideration of the Bill of Complaint in the above entitled suit, and further good cause shown, it is ordered that the above-named defendant, Suda Reynolds, be and appear in this court at Oklahoma City, Oklahoma, on the 11th day of April, 1917, at the hour of nine o'clock a. m., then and there to show cause, if any she can, why a writ of injunction should not issue in this cause, enjoining and restraining said defendant, Suda Reynolds, her agents, servants, and employees, from in any manner or by any means interfering with the complete and exclusive control by the plaintiff, through its agents and officers, of the following described land, to-wit:

The northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north of range five (5) east I. M., Pottawatomie County, Oklahoma, and enjoining her, her agents, servants, and employees, from interfering with the superintendent and special disbursing agent of the Shawnee Indian agency in the performance of his duties with respect to said land;

That a copy of said bill of complaint be served upon the defendant in this case, together with a copy of this order, certified under the hand of the clerk and seal of this court, by the United States marshal of this district, or by some person acting on behalf of the
12 plaintiff, and if such service is made by a person other than said marshal proof of such service shall be by affidavit of the server filed herein.

Dated this 4th day of April, 1917.

JOHN H. COTTERAL,
District Judge.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify that the foregoing is a true and correct copy of original order to show cause in Equity No. 221, United States vs. Suda Reynolds as same appears of record in my office.

Witness my hand and seal of said court at Oklahoma City in said district, this 4th day of April, 1917.

ARNOLD C. DOLDE, *Clerk.*

UNITED STATES MARSHAL'S RETURN.

United States of America, Western District of Oklahoma, ss:

Received this writ April 4th, 1917, at Oklahoma City, Okla., and executed same April 5th, 1917, at 9 miles N. E. of Shawnee, Okla., by leaving a true copy of the within writ and a duplicate of the bill of complaint with Suda Reynolds in person.

JOHN Q. NEWELL, *U. S. Marshal.*
By J. A. MULKEY, *Deputy.*

Fee $2.00
Exp. $5.30

$7.30

Endorsed: Filed in District Court April 6, 1917.

13 CHANCERY SUBPŒNA WITH MARSHAL'S RETURN.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

The United States of America, to Suda Reynolds, greeting:

This is to command you and every of you, that you appear before the judge of the District Court of the United States of America for the Western District of Oklahoma, at the city of Oklahoma City in said district, to answer the bill of complaint of the United States this day filed in the clerk's office of said court in said city of Oklahoma City to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the Western District of Oklahoma to execute:

Witness, the Hon. John H. Cotteral, judge of the District Court of the United States of America for the Western District of Oklahoma, at the city of Oklahoma City in said district, this 4th day of April in the year of our Lord one thousand nine hundred and seventeen.

[SEAL.] ARNOLD C. DOLDE, *Clerk.*

Memorandum.—The above-named defendant [—] notified that unless she files her answer or other defense in the clerk's office of said court, at the city of Oklahoma City aforesaid, on or before the twentieth day after service of the above writ (excluding the day of service), the bill of complaint may be taken pro confesso and a decree entered accordingly.

[SEAL.] ARNOLD C. DOLDE, *Clerk.*

U. S. MARSHAL'S RETURN.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

Received the within writ April the 4th, 1917, and executed
14 the same as follows, to wit: Served on the within named Suda Reynolds, personally, at 9 miles NE. of Shawnee, Okla., by leaving a true copy of the within writ with Suda Reynolds, April 5th, 1917.

JOHN Q. NEWELL, *U. S. Marshal.*
By J. A. MULKEY, *Deputy.*

Fee, $2.00.
Endorsed:

No. 221.

District Court United States, Western District of Oklahoma.

THE UNITED STATES
vs.
SUDA REYNOLDS.

CHANCERY SUBPŒNA.

Returnable April 24, A. D. 1917.

ARNOLD C. DOLDE, *Clerk.*

Filed April 6, A. D. 1917.

ARNOLD C. DOLDE, *Clerk.*
JOHN A. FAIN,
U. S. Attorney, Compt's Sol.

U. S. marshal's office, Western District of Oklahoma.
Received Apr. 4, 1917.
No. 2584, page 178.

DEPENDANT'S RETURN TO ORDER TO SHOW CAUSE AND ANSWER TO PLAINTIFF'S BILL.

To the Honorable John H. Cotteral, judge of the United States District Court for the Western District of Oklahoma:

Comes now Suda Reynolds, the defendant in the above-styled and numbered cause and in response to the order to show cause issued in this cause on the 4th day of April, 1917, and for her return and answer to said order, and to the petition of plaintiff filed herein, alleges and says:

15 1st. She admits that she is a citizen of the United States and of the State of Oklahoma, and that she is a resident of Pottawatomie County, in the western district of the said State.

2nd. She denies that the plaintiff brings this action in its own behalf and in behalf of the other persons named therein, and alleges specifically that the plaintiff has no interest in the subject matter of this suit and has no capacity to maintain this action.

3rd. The defendant admits that on the 16th day of September, 1891, the Secretary of the Interior approved and confirmed the allotments made to the Absentee Shawnee Band or Tribe of Indians in the State of Oklahoma, and that Stella Washington's name appeared upon said roll opposite the number 9, and that she thereby received an allotment which included the northwest quarter of the southwest quarter *of* of section thirty-one (31), township eleven north, range five (5), east of the Indian meridian, in Pottawatomie County, Oklahoma, and also forty acres of land in addition, the exact description of which is unknown to the respondent at this time, and that the title to the eighty acres of land thus allotted was held in trust as provided by the fifth section of the act of Congress approved February 8th, 1887 (24 Stats., 388), and says that the eighty acres so allotted was to be held in trust by the United States, as aforesaid, from the 16th day of September, 1891, until the 16th day of September, 1916, but respondent avers that the said allotment was made under and by virtue of an act of Congress approved March 2nd, 1889, and the agreement made with the Absentee Shawnee Indians, and particularly article 2 of the said agreement, approved by the act of Congress of March 3, 1891 (26 Stats., 989), et seq., which said agreement specifically provides that the allotments so made and in the process of being made should be completed and confirmed, etc., and those to be made—

"Shall be made under the same rules and regulations as to persons, locations, and area as those heretofore made, and when made, shall be confirmed. When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in such allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned

16 act of Congress. (Act of Feb. 8, 1887, supra.) * * * And provided, further, that all such allotments shall be taken on or before January 1, 1891, after which time and up to February 8, 1891, the allotting agent then on said reservation shall make allotments to those Absentee Shawnees resident in said tract of country who have failed or refused to take their allotments as aforesaid, and such allotments so made by such allotting agent shall have the same force and effect as if the selections were made by the Indians in person. And after said date of February 8, 1891, any right to allotment hereunder or by act of Congress shall be deemed waived, and forever cease to exist."

And the defendant says that under and by virtue of the terms of the said agreement, the unallotted lands ceded thereby could not be opened to entry and settlement until the allotments were made, the

title vested in the allottees and the trust imposed, and that the President did, on the 18th day of September, 1891, issue a proclamation restoring the unallotted portion of the reservation belonging to the Absentee Shawnee Indians to the public domain and opening the same to settlement, and he declared therein that the provisional patents, otherwise the trust patents, and the patent to Stella Washington had been issued; that is to say, the President proclaimed that—

"And whereas allotments of land in severalty to the said Sac & Fox Nation, said Iowa Tribe, said Citizen Band of Pottawatomies, and said Absentee Shawnee Band of Indians have been made and approved and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreements with them respectively,

* * * * * * *

"And whereas all the terms, conditions, and considerations required by said several agreements made respectively with said tribes of Indians hereinbefore mentioned and of the laws relating thereto, precedent to opening said several tracts of land to settlement, have been, as I hereby declare, provided for, paid, and complied with."

And said proclamation further provides for the opening of the unallotted lands to settlement as by said acts above mentioned provided.

4th. The defendant further admits that the date of the pro-
17 visional or trust patent issued to Stella Washington, as recorded and signed in the office of the Commissioner of the General Land Office was the —— day of ———, 1892, and that it was in the form and of the legal effect prescribed by the fifth section *of* of the act of February 8, 1887 (24 Stats., 388), but says that the trust period began to run from the date of the approval and confirmation of the allotment, and that as a matter of law the trust patent, although issued at a later date, upon its issuance became effective from and after the date of the confirmation of the allotment by the Secretary of the Interior, to wit, the 16th day of September, 1891.

5th. The defendant admits that the said Stella Washington died in the year 1911, and left as her heirs at law the following-named persons, to wit: James Washington, Walter Washington, Willie Washington, Claudius Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Rolette, Fannie Daugherty, Rose McLennon, and Nannie Washington, and says that said Minnie Chisholm mentioned in the plaintiff's petition was not in existence at the time of the death of the said Stella Washington, but was born long afterwards, but that she is in truth and in fact the illegitimate child of the said Nannie Washington, and as such inherited such interest as her mother had in the estate of Stella Washington.

6th. The defendant admits that the above-named persons are the only heirs of the said Stella Washington, deceased, and as such have inherited from the said allottee the northwest quarter of the south-

west quarter of section thirty-one, township eleven north, range five east of the I. M., but specifically denies that said land is held in trust by the United States, since the 16th day of September, 1916.

7th. The defendant specifically denies that the President of the United States did on November 14th, 1916, or at any other time, extend for a period of ten years the trust period upon the above described allotment, and specifically denies that he attempted to do so, or that he did or performed any act or thing for the purpose of extending the trust period on said land, and the defendant further says that the President of the United States could not lawfully make any order extending the trust period mentioned for the reason that the same had expired prior to November 14, 1916.

18 8th. The defendant admits that on the 24th day of November, 1916, the President of the United States issued the following order:

"It is hereby ordered, under authority contained in section 5 of the act of February 8, 1887 (24 Stats., 388–9), that the trust periods on the allotments of the Absentee Shawnee and Citizen Pottawatomie Indians in Oklahoma, which trust expires during the calendar year 1917, be, and is hereby, extended for a period of ten years from the dates of expiration, with the exception of the following:"

And that the above and foregoing is followed by a number of allotment numbers and names, and that the name of Stella Washington does not appear in the list, but this defendant says that said order did not contemplate the allotments of deceased persons, or lands inherited from allottees, and, further, that the President of the United States by such order did not extend the trust period for the reason that the same was ended, and he could not reimpose it upon the lands of any Indian, and especially upon the lands involved in this suit.

9th. The defendant admits that on the 17th day of February, 1917, Claudius Tyner, one of the heirs above mentioned, for a good and valuable consideration, sold and conveyed his undivided one-eleventh interest in and to the above-described land to the defendant, and the same was evidenced by a warranty deed of the said date, and this defendant says that she is in possession of the said land as a co-tenant with the other ten heirs under and by virtue of the said deed, and she specifically denies that the said conveyance is void and of no effect, but alleges it to be a good and valid conveyance, and defendant avers that the date of the said deed as set out in the plaintiff's petition, to wit, the 7th day of December, 1916, is erroneous, and that the true date is the 17th day of February, 1917.

10th. The defendant admits that on the 26th day of February, 1917, she brought a suit in the superior court in and for Pottawatomie County, Oklahoma, in partition, and says that each and all of the heirs, with the exception of Minnie Chisholm, a minor, agreed to the said proceeding, for the reason that they desired to sell said land, and believing that a judgment in said cause would quiet the title and

enable them to obtain a reasonable compensation for the said land, and that the same was of no value to them in common.

19 11th. The defendant specifically denies that her deed is a cloud upon the title of the United States, or upon the title of their heirs at law, or that it will prevent or does prevent the plaintiff from doing its duty in the premises, and executing a patent in fee simple as it is in duty and honor bound to do, and specifically denies that the suit that she has filed in the Superior Court of Pottawatomie County, Oklahoma, is interfering with the United States, or with the duty of any of its officers, but alleges the facts to be that its officers are attempting to deprive this defendant of her vested interests and that this suit is brought for the purpose of harassing the defendant and the heirs of the said deceased, Stella Washington, and the same is being maintained because the United States, by its proper officers, is refusing to do that which it is in honor bound to do, and which the faith of the nation is pledged to perform.

12th. Further answering, this defendant denies that the United States has any interest in the said land, or that its officers have any duty to perform, except to execute and deliver to the heirs at law a fee simple patent, showing that the title thereto is vested in them in fee simple, as it in truth and in fact became vested on the 16th day of September, 1916, and that the United States and its officers have refused to do their plain duty in the premises, and their action in refusing to comply with the solemn covenant and agreement of the United States is causing the defendant great loss and injury, and is causing the parties for whom the United States purports to bring this suit great loss and damage, and that they are entitled to the issuance of the patent provided for under the grant of allotment made to Stella Washington.

Wherefore, the defendant prays judgment of the court decreeing the heirs of Stella Washington to be owners in fee simple of said northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north, range five (5) east of the I. M., and that this defendant is the owner of an undivided one-eleventh interest in and to said forty acres of land, and for such other and further relief as the premises justify.

MARK GOODE and
HAL JOHNSON,
Attorneys for the Defendant.

Endorsed: Filed in District Court April 18, 1917.

20 FINAL DECREE.

This cause came on for final hearing on this 4th day of May, 1917, a regular day of the March, 1917, term of the United States District Court for the Western District of Oklahoma, sitting at Oklahoma City, State of Oklahoma, and same was submitted by agreement of counsel in open court upon bill and answer, and said cause having been argued by counsel and the court fully advised in the premises,

thereupon upon a consideration thereof it is ordered, adjudged, and decreed:

That heretofore there was deposited in the General Land Office of the United States a schedule of allotments of land, dated August 7, 1891, from the Acting Commissioner of Indian Affairs, approved by the Secretary of the Interior September 16, 1891, whereby it was shown that under the provisions of the act of Congress approved February 8, 1887 (25 Stat., 388), as amended by act of Congress, approved March 3, 1891 (26 Stat., 1019), Stella Washington, Absentee Shawnee Allottee No. 9, had been allotted the following-described land:

The northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north of range five (5) east of the Indian meridian, in Pottawatomie County, State of Oklahoma; and that upon the 6th day of February, 1892, a trust patent was issued to the said Stella Washington for said tract of land, containing provisions under the law then in force that the United States of America does and will hold said land in trust for the said Stella Washington and, in case of her death, for her heirs, for a period of twenty-five years, at the expiration of which time the United States would convey said tract of land to the said Stella Washington, or, in case of her death, to her heirs, in fee, discharged of said trust and free of all charges and incumbrances whatsoever; and that the President may in his discretion extend said trust period; and that said allotment was made by law subject to said trust and to restriction against conveyance for said period from the date of said trust patent.

That the President of the United States by an Executive order dated November 24, 1916, extended said trust period as to said land for a period of ten years.

21 That the said Stella Washington died in the year 1911; that James Washington, Walter Washington, Willie Washington, Claudius Tyner, Charlie Tyner, Mary Washington, Ella Washington, Hattie Washington Rolette, Fannie Washington Daugherty, Rose Washington McLennon, and Minnie Chisholm were the lawful heirs of, and inherited from, the said Stella Washington the land herein described.

That the United States of America still holds the said land above described in trust for the heirs above named.

That on the 17th day of February, 1917, Claudius Tyner, one of the heirs aforesaid of said Stella Washington, deceased, made, executed, and delivered to the defendant, Suda Reynolds, a warranty deed purporting to convey an undivided one-eleventh interest in and to the land herein described to the said Suda Reynolds, and said deed was filed for record in the office of the county clerk of Pottawatomie County, Oklahoma, on the 18th day of April, 1917.

That said deed was made without the permission, consent, or approval of the Secretary of the Interior, and that the same is void.

It is ordered, adjudged, and decreed by the court that said war-

ranty deed executed by Claudius Tyner on the 17th day of February, 1917, conveying a one-eleventh interest in and to the northwest quarter of the southwest quarter of section thirty-one (31), township eleven (11) north of range five (5) east of the Indian meridian, in Pottawatomie County, Oklahoma, to the defendant, Suda Reynolds, and filed for record in the office of the county clerk of Pottawatomie County, Oklahoma, on the 18th day of April, 1917, be and it is cancelled and held for naught; and that the said defendant, Suda Reynolds, has no right, title, or interest in and to said tract of land by reason of said deed executed as aforesaid.

It is further ordered, adjudged, and decreed that the said Suda Reynolds be, and she is hereby, enjoined from setting up any claim, lien, or title, or claiming any estate, right, title, or interest in and to the land hereinabove described, or to the possession of said tract of land or any part thereof.

It is further ordered, adjudged, and decreed that the defendant, Suda Reynolds, her agents and servants, be, and they are
22 hereby, enjoined from any other or further conveyances of said lands, and from negotiating with or procuring from said heirs any other or further deed, contract, or conveyance of any character touching any of the undivided interests in and to said land or any part of same, except as such may be approved by the Secretary of the Interior; and from in any way interfering with the plaintiff, its agents and servants, in the control, use, and occupancy thereof.

And it is further ordered, adjudged and decreed that the defendant, Suda Reynolds, be enjoined from and aften ten days from this date from in any way using, occupying, or cultivating said land, or any party thereof.

And it is further ordered, adjudged, and decreed that the plaintiff have its costs in this case expended and that the same be taxed against the defendant, Suda Reynolds.

To which decree, and every part thereof, the defendant, Suda Reynolds, excepts.

JOHN H. COTTERAL,
District Judge.

O. K., L. D. THRELKELD,
Assistant U. S. Attorney, Solicitor for Plaintiff.
O. K., MARK GOODE,
Solicitor for Defendant.

Endorsed: Filed in District Court May 4, 1917.

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable John H. Cotteral, United States District Judge, presiding for the Western District of Oklahoma:

Suda Reynolds, defendant in the above-entitled cause, feeling that she is aggrieved by the ruling and decree of the District Court of

the United States for the Western District of Oklahoma, entered at the March term, 1917, in the above-entitled cause, comes now by her attorneys, Mark Goode and Hal Johnson, and petitions the said court for an order allowing the said defendant to prosecute an appeal to the honorable Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided, for
23 the reversal of the said decree, and files herewith an assignment of error as required by law; that citation issue according to law, and that the transcript of the record, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

HAL JOHNSON,
MARK GOODE,
Attorneys for Defendant.

And now, to wit, on May 12th, 1917, it is ordered that the appeal be allowed as prayed for, and it is further ordered that the injunction heretofore allowed herein be stayed pending this appeal, and supersedeas bond therefor is fixed at $500.00.

JOHN H. COTTERAL,
United States District Judge of the Western District of Oklahoma, Eighth Judicial District.

Endorsed: Filed in District Court May 12, 1917.

ASSIGNMENT OF ERRORS.

Comes now Suda Reynolds, the defendant in the above-entitled cause, and makes and files this her assignment of errors.

First. The court erred in not dismissing the bill of the plaintiff in this cause for the reason that said plaintiff has no interest in the subject matter of this action and is without capacity to maintain said suit.

Second. The court erred in decreeing that the President extended the trust period as to the land involved in said suit on November 24, 1916, for the reason that the trust period thereon expired by operation of law on the 16th day of September, 1916.

Third. The court erred in decreeing that the United States of America held the land involved in this suit in trust.

Fourth. The court erred in cancelling and holding for naught the deed executed by Claudius Tyner, conveying a one-eleventh interest in and to the

Northwest quarter (1-4) of the southwest (1-4) of section thirty-one (31), township eleven (11) north of range five (5) east I. M., in Pottawatomie County to this defendant.

24 Fifth. The court erred in enjoining the defendant from setting up any claim or title to said land by virtue of said deed.

Sixth. The court erred in enjoining the defendant from interfering with the plaintiff, its agents and servants, in the control, use, and occupancy of said land.

Seventh. The court erred in enjoining the defendant from operating or cultivating said land.

Eighth. The court erred in rendering a decree in favor of the plaintiff and against the defendant.

Ninth. The court erred in not decreeing the trust period or the time during which said lands were held in trust by the United States for the allottee, Stella Washington, and her heirs, expired on the 16th day of September, 1916, and that the title to the land vested in fee in said allottee and her heirs on that date.

MARK GOODE,
HAL JOHNSON,
Attorneys for Defendant, Shawnee, Oklahoma.

Endorsed: Filed in District Court May 12, 1917.

SUPERSEDEAS BOND ON APPEAL.

Know all men by these presents:

That we, Suda Reynolds, of Pottawatomie County, State of Oklahoma, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, are held and firmly bound unto the United States of America, in the full and just sum of five hundred ($500.00) dollars to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents. Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at the March, 1917, term of the District Court of the United States sitting in and for the Western District of
25 the State of Oklahoma, in a suit depending in the said court between the United States of America, as plaintiff, and Suda Reynolds, defendant, an order and decree was rendered against the said Suda Reynolds, and the said Suda Reynolds has obtained an order allowing an appeal, of the said court to reverse the order and decree in the aforesaid suit, and a citation directed to the United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals of the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said Suda Reynolds shall prosecute said appeal to effect, and answer all damages and costs if she fail to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

SUDA REYNOLDS,
By MARK GOODE, *Her Atty.*

[SEAL.]

UNITED STATES FIDELITY AND GUARANTY CO.,
By GEO. E. MCKINNIS,
By EDWARD HOWELL,
Attorney in Fact.

Approved by John H. Cotteral, judge of the United States District Court for the Western District of Oklahoma.

Endorsed: Filed in District Court May 12, 1917.

APPELLANTS PRÆCIPE FOR TRANSCRIPT.

To the Clerk of the United States District Court:

You will please cause to be printed the following-named portions of the record in the above-entitled cause:

1st. The petition or bill of the plaintiff.

2nd. The answer and return of the defendant.

3rd. The order and decree.

4th. The petition for appeal and the order allowing same.

26 5th. The assignments of error.

6th. The bond on appeal.

7th. The citation.

The defendant, Suda Reynolds, hereby elects to have the record printed under the supervision of the clerk of the United States District Court for the Western District of Oklahoma.

MARK GOODE & HAL JOHNSON,
Attorneys for the Defendant.

Service of a copy of the foregoing præcipe acknowledged this 19th day of May, 1917.

JOHN A. FAIN,
United States Attorney for the Western District of Oklahoma.

Endorsed: Filed in District Court May 19th, 1917.

PRÆCIPE OF U. S. FOR ADDITIONAL PORTIONS OF RECORD.

To the clerk of the above-entitled court:

In addition to the portions of record designated by the defendant herein, you will cause to be included in the transcript of the record on appeal and to be printed, the following:

Order to show cause, with marshal's return.

Chancery subpœna, with marshal's return.

JOHN A. FAIN,
United States Attorney.

Endorsed: Filed in District Court June 5, 1917.

27 CLERK'S CERTIFICATE TO TRANSCRIPT.

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true, and complete transcript of the pleadings,

record, and proceedings in said court, in case No. 221, in equity, wherein the United States of America is plaintiff and Suda Reynolds is defendant, as full, true, and complete as the said transcript purports to contain and as called for by the præcipes for transcript and designation of the record above set forth.

I further certify that the original citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Guthrie in said district, this 7th day of June, A. D. 1917.

ARNOLD C. DOLDE, *Clerk*,
By M. V. HAWS, *Deputy Clerk*.

Seal of the United States District Court, Western District of Oklahoma.

28 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of counsel for appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

SUDA REYNOLDS, APPELLANT, *vs.* UNITED STATES OF AMERICA.	No. 4983.

The clerk will enter my appearance as counsel for the appellant.

MARK GOODE.
HAL JOHNSON.

(Endorsed): Filed in U. S. Circuit Court of Appeals Jul. 5, 1917.

(Appearance of Mr. John A. Fain, United States attorney, as counsel for the appellee.)

The clerk will enter my appearance as counsel for the appellee.

JOHN A. FAIN,
United States Attorney.

(Endorsed): Filed in U. S. Circuit Court of Appeals Sep. 24, 1917.

29 (Appearance of Mr. Lal D. Threlkeld, assistant United States attorney, as counsel for the appellee.)

The clerk will enter my appearance as counsel for the appellee.

LAL D. THRELKELD,
Assistant U. S. Attorney,
Western District of Oklahoma,
Oklahoma City, Oklahoma.

(Endorsed): Filed in U. S. Circuit Court of Appeals Dec. 18, 1917.

(Order of argument.)

December term, 1917.

TUESDAY, DECEMBER 18, 1917.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Mark Goode for appellant, contined by Mr. Lal D. Threlkeld for appellee and the hour for adjournment having arrived, further argument was postponed until tomorrow.

(Order of submission.)

December term, 1917.

WEDNESDAY, DECEMBER 19, 1917.

This cause having been called for further hearing, argument was resumed by Mr. Lal D. Threlkeld for appellee and concluded by Mr. Mark Goode for appellant.

30 Thereupon this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

31 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4983.—December term, A. D. 1917.

SUDA REYNOLDS, APPELLANT, *vs.* UNITED STATES OF AMERICA, APPELLEE.	Appeal from the District Court of the United States for the Western District of Oklahoma.

Mr. Mark Goode (Mr. Hal Johnson was with him on the brief), for appellant.

Mr. Lal D. Threlkeld, assistant United States attorney (Mr. John A. Fain, United States attorney, was with him on the brief), for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and YOUMANS, District Judges.

YOUMANS, District Judge, delivered the opinion of the court.

This is an appeal from a decree in which it is adjudged that appellant, Suda Reynolds, defendant below, has no right, title, or interest in a certain tract of land in Pottawatomie County, Oklahoma. The suit was brought by the United States against the appellant as the grantee of one of the heirs of Stella Washington, an Absentee Shawnee allottee, under the act of Congress approved February 8, 1887, as amended by act of Congress approved March 3, 1891.

The allotment of the land in question was made under sections 3 and 5 of the act of February 8, 1887, which sections so far as applicable here, read as follows:

32 "Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office. * * *

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Under the authority conferred by these sections, allotments were made by the proper officers, a schedule of the allotments, dated August 7, 1891, was deposited in the General Land Office of the United States, and on the 16th of September, 1891, these allotments were approved by the Secretary of the Interior. The allotment of the land in question to Stella Washington was included in the schedule and in the approval.

Section 5, above quoted, provides for a trust period of twenty-five years, which period could be extended by the President of the United States at his discretion. The preliminary or trust patent was issued to Stella Washington, February 6, 1892.

33 On the 24th of November, 1916, the President made the following order:

"It is hereby ordered under authority contained in section five of the act of February 8, 1887 (24 Stats., 388–9), that the trust periods on the allotments of the Absentee Shawnee and Citizen Pottawatomie Indians in Oklahoma, which trust expires during the calendar year 1917, be, and is hereby, extended for a period of ten years from the dates of expiration, with the exception of the following:"

Then follow numbers of allotments and names of allottees. Stella Washington's name and number do not appear in the list.

Appellant contends that the trust period began on the 16th of September, 1891, the date of the approval of the allotments by the Secretary of the Interior, and that it had expired on the 24th of November, 1916, the date of the President's order. The conveyance to appellant was executed February 17, 1917. The Government contends that the trust period began, so far as the land involved in this case is concerned, on the 6th of February, 1892, the date of the preliminary or trust patent, and that as to such land the trust period expired on the 6th day of February, 1917.

Each allottee became entitled to his preliminary or trust patent upon the approval of the allotments by the Secretary of the Interior. The issuance of the patent was a mere ministerial act. The beginning of the trust period under the act of Congress did not depend upon the time of the performance of the ministerial act by the officers of the General Land Office.

Counsel for the Government contend that the case of the United States v. Rowell (243 U. S., 464) is decisive of the question involved here.

In that case Mr. Justice Van Devanter, speaking for the court, said:

"This is an action in ejectment brought by the United States against James F. Rowell and two others. The land in controversy is a quarter-section—one hundred sixty acres—in an Indian school reserve in Comanche County, Oklahoma.

"Three statutes, all enacted in the same year, must be noticed. The first of these is a provision in the act of April 4, 1910
34 (c. 140, 36 Stat., 269, 280), authorizing and directing the Secretary of the Interior 'to enroll and allot' James F. Rowell as an adopted member of the Kiowa Tribe of Indians. The second is the following provision in the act of June 17, 1910 (c. 299, sec. 3, 36 Stat., 533): 'That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee for' the tract in controversy 'to James F. Rowell, a full member of the Kiowa, Comanche, and Apache Tribes of Indians of Oklahoma, who has heretofore received no allotment of land from any source, this to be in lieu of all claims to any allotment of land or money settlement in lieu of an allotment.' And the third is the express repeal of the provision just quoted by the act of December 19, 1910 (c. 3, 36 Stat., 887). The controversy turns chiefly upon the true construction and effect of the provision of June 17 and the constitutional validity of the repealing provision of December 19. * * *

"But it is insisted that the provision of June 17, 1910, was a grant in praesenti and operated in itself to pass the full title to Rowell, and therefore that he had a vested right in the land which the repealing act could not affect. If the premise be right, the conclusion is obviously so. But is the premise right? Of course, a grant may be made by a law as well as by a patent issued pursuant to a law, but whether

a particular law operates in itself as a present grant is always a question of intention. We turn, therefore, to the provision relied upon to ascertain whether it discloses a purpose to make such a grant; that is to say, a purpose to pass the title immediately without awaiting the issue of a patent. We find in it no words of present grant, but only a direction to the Secretary of the Interior 'to issue a patent in fee' to Rowell for the tract described. Only through this express provision for a patent do we learn that a grant is intended, and if it were eliminated nothing having any force would remain. This, we think, shows that a present statutory grant was not intended, but only such a grant as would result from the issue of a patent as directed. The cases cited as making for a different conclusion are plainly distinguished in that they deal with laws or treaties making grants and either containing no provision for a patent or providing for one merely by way of further assurance.

"It is also insisted that, by applying for a patent before the provision therefore was repealed, Rowell accepted that provi-
35 sion and thereby acquired a right to have it carried into effect of which he could not be divested by the repealing act consistently with due process of law. But the provision did not call for an acceptance and it is evident that none was contemplated, other than such as would be implied from taking the patent when issued. Besides, statutes of this type are not to be regarded as proposals by the Government to enter into executory contracts, but as laws which are amendable and repealable at the will of Congress, save that rights created by carrying them into effect can not be divested or impaired. (Gritts v. Fisher, 224 U. S., 640, 648; Choate v. Trapp, 224 U. S., 665, 671; Sizemore v. Brady, 235 U. S., 441, 449.) * * *

"For these reasons we conclude that the repealing provision was valid, and that while it did not affect Rowell's status as an adopted member of the tribe or his right to obtain in the usual way an allotment from the tribal lands not specially reserved, it did revoke the special provision made in his behalf in the act of June 17, 1910."

The Supreme Court in that case held that an act of Congress directing that a patent be issued to an individual could be repealed by Congress before the patent itself was delivered and that no constitutional right was violated by the repealing act.

The instant case presents a different question. The right of Stella Washington to a preliminary or trust patent became vested on the day of the approval of her allotment. Her equitable title was then complete and did not depend upon the delivery of the patent. Ballinger *v.* Fort, 216 U. S., 240.

The postponement of the performance of the ministerial act of causing a patent to be prepared and signed could not postpone the vesting of the equitable interest in Stella Washington nor could it postpone the beginning of the trust period. In the case of Monson *v.* Simonson, 231 U. S., 341, there is presented an instance in which a specific allotment was by act of Congress relieved from the restrictions imposed during the trust period and the Secretary of

the Interior was authorized to cause to be delivered to the allottee an unconditional patent. In that case the court said:

"It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with the title in fee. Recognizing that this was so, and for reasons deemed
36 sufficient, Congress, by the provision in the act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: 'The Secretary of the Interior is hereby authorized and empowered to issue a patent' to the allottee. By 'patent' is meant, of course, the ultimate patent passing the fee, for the trust patent or allotment certificate had issued sixteen years before. The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it seemed wise, but not to require him to do so. And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words 'and all restrictions as to sale, incumbrance, or taxation of said lands are *hereby* removed.' It hardly can be said that the absence of those words in this instance and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee."

The authorization to deliver a patent to the allottee was permissive and not mandatory as stated by the Supreme Court. The language of section 5 of the act of February 8, 1887, is mandatory. It says: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, etc." The Secretary is given no discretion with regard to the issuance of the patents.

It is urged that departmental construction is opposed to the views herein expressed. Such construction is always entitled to great consideration, but in this instance such construction is, in our judgment, opposed to the plain and unambiguous language of the statute.

There are statutes in which Congress has provided that allotments shall be inalienable for a certain period from the date of the patent.

37 The act of March 2, 1889, 25 Stat., 1013–1014, providing for allotments to the Peorias and Miamies contains the following provision:

"The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of the patent therefor, and said lands so allotted and patented shall be exempt from levy, sale, taxation, or forfeiture for a like period of years."

The act of March 2, 1895, 28 Stat., 907, contains the following provision:

"Provided that said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

The act of July 1, 1902, 32 Stat., 641–642, contains the following provisions:

"12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

"13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment. * * *

"16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent."

It thus appears that whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so.

In our judgment the trust period expired September 16, 1916, before the issuance of the Executive order of November 24th of the same year. The President had no power to revive the expired period nor to create another period.

38 Congress created a trust period and authorized the President to extend it in his discretion. Congress, however, did not authorize the President in his discretion to create a new trust period. The power to extend a trust period already created is one thing. The power to create a new trust period is an entirely different thing.

It follows that the case must be reversed and remanded with directions to dismiss the bill of complaint. It is so ordered.

Filed May 3, 1918.

TRIEBER, *District Judge*, dissenting.

I concur in the conclusions of the majority of the court that the trust period of twenty-five years began on September 16th, 1891, the date of the approval of the allotment by the Secretary of the Interior, and that it had expired before the 24th day of November, 1916, the date of the President's order extending the trust period for ten years from the date of expiration.

But in view of the decisions of the Supreme Court in Brader v. James and Talley v. Burgess, opinions filed March 4, 1918, and the

decisions of this court in David v. Youngken, filed April 3, 1918, and Harris v. Bell, opinion filed April 30, 1918, I am of the opinion that, as the President was authorized by the proviso in section 5 of the act of February 8, 1887, 34 St., 388, to extend the trust period in his discretion, he had the same power to extend it after the expiration of the first trust period as Congress had.

The order by the President extending the trust period having been made before the conveyance of the allotment and without the approval of the Secretary of the Interior, the conveyance was absolutely void.

For this reason I am of the opinion that the decree of the District Court was right and should be affirmed.

Filed May 3, 1918.

39 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1918.

Monday, May 6, 1918.

SUDA REYNOLDS, Appellant,
vs.
UNITED STATES OF AMERICA. } No. 4983.

Appeal from the District Court of the United States for the Western District of Oklahoma.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby, reversed without costs to either party in this court.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the bill of complaint.

MAY 6, 1918.

40 (Clerk's certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Oklahoma as prepared, printed,

and certified by the clerk of said District Court to the United States Circuit Court of Appeals in pursuance of the act of Congress, approved February 13, 1911, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and indorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Suda Reynolds was appellant and the United States of America was appellee, No. 4983, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twentieth day of July, A. D. 1918.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

41 In the Supreme Court of the United States.

October Term, 1918.

THE UNITED STATES, Petitioner,
v.
SUDA REYNOLDS. } No. 591.

STIPULATION AS TO RETURN TO WRIT OF CERTIORARI.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted therein.

JNO. W. DAVIS,
Solicitor General.
MARK GOODE and
HAL JOHNSON,
Counsel for Respondent.

NOVEMBER 6, 1918.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 4983. Suda Reynolds, appellant, vs. United States of America. Stipulation as to return to writ of certiorari. Filed Nov. 18, 1918. E. E. Koch, clerk.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the Eighth Circuit, greeting:

Being informed that there is now pending before you a suit in which Suda Reynolds is appellant, and The United States of America is appellee, No. 4983, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Western District of Oklahoma, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
43 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the thirty-first day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

44

RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Suda Reynolds, appellant, vs. United States of America, No. 4983, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this nineteenth day of November, A. D. 1918.

[SEAL.]

E. E. KOCH,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

(Endorsed:) File No. 26677. Supreme Court U. S., October Term, 1918. Term No. 591. The United States of America, Pl'ff in Error, vs. Suda Reynolds. Writ of certiorari and return. Filed November, 27, 1918.

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contention of the Government that the trust period began at the date of the issuance of patent and expired twenty-five years thereafter, while the Circuit Court of Appeals reversed the decision of the District Court by a divided court, and remanded the cause with direction to dismiss the bill of complaint, holding that the trust period began with the date of the approval of the allotment by the Secretary of the Interior and expired twenty-five years thereafter.

The case is of importance to the Department of the Interior and the Department of Justice in the administration and enforcement of the restrictions on alienation in the trust patents issued under the act of February 8, 1887. The petition for writ of certiorari, page 4, avers that approximately 4,800 allotments to members of thirteen tribes are affected by the decision of this case, and the decision of this court determines the disposition of other similar suits now pending.

Opposing counsel concur.

ALEX. C. KING,
Solicitor General.

DECEMBER, 1918.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, *v.* SUDA REYNOLDS. } Petitioner, No. ——.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above entitled cause.

QUESTION PRESENTED.

The case presents the question whether the twenty-five-year trust period provided for in the General Allotment Act of February 8, 1887 (24 Stat. 389)*,

* The pertinent provisions of the act of 1887 are as follows:

SEC. 3. That the allotment provided for in this act shall be made by special agents appointed by the President for such purpose and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action and to be deposited in the General Land Office.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of

begins to run from the date of the issuance of the so-called trust patent or from the date of the approval of the allotment by the Secretary of the Interior.

THE FACTS.

This suit was brought against the defendant Suda Reynolds, as the grantee of one Stella Washington, an Absentee Shawnee allottee, under the act of February 8, 1887, as amended by the act of March 3, 1891 (26 Stat. 1019), to cancel a deed executed by one of the 11 heirs of the allottee for his one-eleventh interest in 40 acres of land in Pottawatomie County, Okla. The facts are undisputed, and it is alleged in the bill of complaint, and admitted in the answer, that the schedule of allotments, including this allotment, dated August 7, 1891, was approved by the Secretary of the Interior September 6, 1891, and deposited in the General Land Office February 6, 1892, on which date a trust patent was issued to the allottee. A certified copy of this trust patent is attached hereto as Appendix A. The allottee died in

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the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act.

1911. On November 24, 1916, the President issued an order extending for a period of 10 years the trust periods on the allotments to Absentee Shawnee Indians in Oklahoma expiring during the calendar year 1917, with certain enumerated exceptions. The allotment in question does not appear among the exceptions. On February 17, 1917, Claudius Tyner, one of the heirs of the deceased allottee, executed a warranty deed purporting to convey his interest in this land to the defendant.

It was contended by the plaintiff that the trust period began on February 6, 1892, the date of the trust patent, and expired 25 years thereafter, to wit, February 6, 1917, and that therefore the allotment came within the terms of the Executive Order of November 24, 1916, which extended the trust period for 10 years, and consequently the deed to the defendant was void.

It was contended by the defendant that the trust period began on September 6, 1891, the date of the approval of the allotment, and expired 25 years thereafter, to wit, September 6, 1916, and that the allotment was therefore not within the terms of the Executive Order and was free from restrictions on February 17, 1917, when the deed in question was executed.

The District Court held with the contention of the Government and decreed the cancelllation of the deed, but the Circuit Court of Appeals reversed the decision of the District Court and remanded the cause with directions to dismiss the bill of complaint.

The value of the one-eleventh interest in the 40 acres of land directly in issue is less than $1,000 and insufficient to allow the case to be brought to this court by appeal.

REASONS FOR ALLOWANCE OF WRIT.

The decision of the Circuit Court of Appeals reversing the judgment of the District Court was by a divided court and there are other cases pending in the District Court involving this question.

The Assistant Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated July 3, 1918, says:

> Attached to this communication is a list of Indian Tribes where the executive order extending the trust period on allotments was made more than twenty-five years from the date of the approval of the schedule of allotments but within twenty-five years of the issuance of the trust patents. Approximately 4,800 allotments to members of the thirteen tribes listed are affected by the opinion of the Circuit Court of Appeals. All these Indians have been found by the department to be incapable of managing their own affairs, and unless the opinion is reversed by the Supreme Court there is little doubt that a great proportion of these incompetents will lose part, possibly nearly all, of their property, and the Government will not have the power to aid them.
>
> Not only the allotments on which the extensions have been made will be affected, but others where the schedules were approved

more than twenty-five years ago, and the trust patents issued less than twenty-five years ago. In some cases, for various reasons, several years elapsed between the date of approval of the schedules and the issuance of the patents, and under this opinion the lands would be taxable long before the Government considers them liable for taxes.

The case is, therefore, of general and public importance.

BRIEF IN SUPPORT OF THE PETITION.

I.

The decision of the Circuit Court of Appeals reverses the contemporaneous interpretation put upon the act of 1887 by the executive department in issuing trust patents thereunder and since uniformly adhered to.

The trust patents issued under this act declared the trust contemporaneously with the instruments creating them, and thus the executive department contemporaneously interpreted the statute to mean that the trust period should begin with the date of the patent. In 38 L. D. 559, 561, this interpretation of the Interior Department is adhered to in the opinion of the First Assistant Secretary when, in considering allotments under this act to the Klamath Indians, he said:

> The language of section 5 of the act of 1887 is "that upon the approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and

declare that the United States does and will hold the land thus allotted," etc. Here clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, "does," shows that the trust period begins to run only upon such issuance. The form of patent both under the acts of 1887 and 1906 reads: "and hereby declares that it does and will hold the land thus allotted," etc. This same idea is further expressed in section 6 of the act of 1887, according citizenship to the allottee, which citizenship is not accorded until after issuance of patent, as shown by the following language: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been *made* shall have the benefit of and be subject to the laws * * * and every Indian born within the territorial limits of the United States to whom allotments shall *have been made* under the provisions of this act * * * is hereby declared to be a citizen of the United States." Under the act of 1906 the allottee is accorded citizenship only upon the expiration of the trust period and issuance of patent in fee at any time the Secretary of the Interior may be satisfied of the competency of the allottee. Provision is also made in said act, as well as in the act of May 29, 1908, for issuance of patents in fee to the heirs of deceased allottees or their lands may be sold and patent issued to the purchasers. It thus follows that by ruling that an allotment is *made* only upon issuance of trust patent, and that the trust

> period begins to run only from that date, the allottee or his heirs may, nevertheless, curtail that period by securing patent in fee.

This construction by executive officers of the Government charged with the administration of Indian affairs, and all matters of public and Indian lands, is entitled to great weight. *United States* v. *Arredondo*, 6 Pet. 691; *United States* v. *Holliday*, 3 Wall. 407; *Geofroy* v. *Riggs*, 133 U. S. 258, and is "determinately persuasive," *United States* v. *Hammers*, 221 U. S. 220, 229.

The very least that can be said is that the language of the act is fairly susceptible to the interpretation put upon it by the Interior Department and should not be overthrown, for in *Schell's Executors* v. *Fauche*, 138 U. S. 562, 572, the court, speaking through Mr. Justice Brown, said:

> In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling.

II.

The uniform interpretation by the Interior Department is clearly right.

The provision of the act requiring the Secretary to cause to be issued patents declaring the trust is not self-executing and prior to the actual issuance of the trust patent there is no declaration of trust. Indeed it is clear that the mere approval of the schedule of allotments is not a declaration that the

United States will hold the title in trust for the benefit of the allottee, for the Secretary is not empowered to declare the trust or to issue patents for these lands. Under section 450 of the Revised Statutes the President is authorized to appoint a secretary whose duty it shall be, under the direction and guidance of the President, to sign in his name and for him, all patents for land granted under the authority of the United States. Congress provided the terms of the trust and left it to the President to declare the trust.

To overthrow this uniform ruling of the Department of the Interior and the contemporaneous interpretation put upon the statute by the President in issuing the trust patents, the Circuit Court of Appeals relies, first, upon the proposition that the right of the allottee in the lands became vested upon the approval of her allotment and that the issuance of a patent therefor was merely a ministerial act; and second, that whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so.

It is unimportant to determine when the right to an allotment becomes a vested right in land, since the extension or shortening of the trust period does not affect the vested right of the allottee. *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *Brader* v. *James*, 246 U. S. 88. In this connection it might be well to note that under the proviso in section 5 of the act of 1887 the laws of descent and partition in the State or Territory where such lands are situated

apply to them only after patents therefor have been executed and delivered. This clearly evidences the intent of Congress that an inheritable estate in the lands (not necessarily in the right to an allotment) is not conferred merely by the approval of the allotment. The case of *United States* v. *Rowell*, 243 U. S. 464, is directly in point. In that case an act of Congress directed the Secretary of the Interior to issue a patent in fee to a designated member of an Indian tribe for a designated tract of land set apart as his allotment. It was insisted that this was a grant *in praesenti* and that therefore the Indian had a vested right in the land which could not be affected by a subsequent act of Congress for the repeal of the grant passed after the Indian had applied for a patent but before patent issued. The court held that the act was not a grant *in praesenti*, and that the Indian obtained no vested right in the land. In the *Rowell* case Congress had approved the allotment of the Indian and directed a patent to issue, while in this case the Secretary approved the allotment and the President issued the patent. However, as before said, the question of the duration of the trust period in no way affects any vested right of the Indian, and when the Indian's right vests is not here material.

The Circuit Court of Appeals points out various statutes under which Congress provided for the issuance of patents to Indians conveying the legal title to their allotments, with the provision that the land should be inalienable for a specific time from the

date of the issuance of patent, and from these statutes the court below concludes that whenever Congress desires the trust period to begin with the date of the patent it expressly says so. The statutes cited by the Circuit Court of Appeals, however, are not statutes relating to allotments to be held in trust for the Indians under trust patents, but relate solely to allotments where the legal title is conveyed by patent containing a restriction against alienation.

These statutes, therefore, do not justify the decision of the court, and there is no statute, so far as we are advised, providing for the issuance of trust patents, which declares that the trust shall run from the date of the patents.

There is no good reason why Congress should have made the trust period commence before the issuance of the instrument declaring it any more than there would have been for making restriction against alienation commence before patent issued, and in the absence of a contrary provision the clear inference is that the trust commenced with the date of the instrument declaring it.

CONCLUSION.

It is respectfully submitted that writ of certiorari should issue as prayed, and that the decree of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

JOHN W. DAVIS,
Solicitor General.

JULY, 1918.

"APPENDIX A."

DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington Jul 20 1918.

I hereby certify that the annexed copy of patent is a true and literal exemplification from the record which is in my custody in this office.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

(Signed) L. Q. C. LAMAR.
Recorder of the General Land Office.

[SEAL.]

The United States of America, to all to whom these presents shall come, greeting.

WHEREAS, There has been deposited in the General Land Office of the United States a schedule of allotments of land, dated August 7, 1891, from the Acting Commissioner of Indian Affairs, approved by the Secretary of the Interior Sept. 16, 1891 whereby it appears that, under the provisions of the Act of Congress approved February 8, 1887 (24 Stats., 388), as amended by the Act of Congress of March 3, 1891 (26 Stats., 1019) Stella Washington, an Indian of the Absentee Shawnee tribe or band, has been allotted the following described land, viz:

The North half of the South-west quarter; and the West half of the South-east quarter of Section thirty one, in township eleven North, of Range five East of the Indian Meridian, Oklahoma Territory, containing one hundred and sixty acres.

Fee Pat Issued for 80 A
Letter No. 125884–11
Patent No. 200205

NOW, KNOW YE, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of the 8th February, 1887, HEREBY DECLARES that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Stella Washington or, in case of her decease, for the sole use of her heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian,

or her heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may, in his discretion, extend the said period.

IN TESTIMONY WHEREOF, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed

Given under my hand at the City of Washington, this sixth day of February, in the year of our Lord one thousand eight hundred and ninety two, and of the Independence of the United States the one hundred and sixteenth.

BENJAMIN HARRISON,
By M. MCKEAN, *Secretary*.

By the President:

D. P. ROBERTS,
Recorder of the General Land Office.

[L. S.]

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, PETITIONER,
v.
SUDA REYNOLDS.
No. 591.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On April 4, 1917, the United States filed its bill of complaint in the District Court of the United States for the Western District of Oklahoma in behalf of Claudius Tyner and 10 other persons as heirs at law of Stella Washington, deceased, a member of the Absentee Shawnee Tribe of Indians of Oklahoma, seeking to cancel a deed made by Claudius Tyner to Suda Reynolds on February 17, 1917, attempting to convey an undivided one-eleventh interest in a certain tract of land inherited by said 11 heirs from said Stella Washington, an Absentee Shawnee allottee thereof, under which deed said Suda Reynolds as grantee therein was seeking to maintain a suit

for partition in the Superior Court of Pottawatomie County, Okla. (R. 2–5).

The tract of land was one the legal title to which was held by the United States in trust for Stella Washington, and, in case of her death, for her heirs, for a period of 25 years, at the expiration of which time the United States would convey the same by patent in fee, discharged of said trust, to said Indian or her heirs, as aforesaid, unless the trust period had been extended by the President for a longer period (R. 3).

The allotment and conveyance of these lands were made under the provisions of the act of Congress approved February 8, 1887, 24 Stat. 388, c. 119, as amended by the act of Congress of March 3, 1891, 26 Stat. 989, 1019, c. 543 (R. 2–4).

These acts provided that the allotments should be made under the direction of the Secretary of the Interior, and that upon approval of the allotments by him he should cause patents to issue therefor, in the name of the allottees, which patents—

> shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, dis-

> charged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. (Sec. 5, act of 1887.)

The allotment of this land to Stella Washington was made and approved by the Secretary on September 16, 1891 (R. 2).

The trust patent was issued to the United States in trust, as aforesaid, on February 6, 1892 (R. 2).

On November 24, 1916, the President, by Executive order, duly made and proclaimed, extended said trust period for 10 years (R. 3).

Thereafter, on February 17, 1917, Claudius Tyner executed said deed to said one-eleventh interest to Suda Reynolds (R. 3).

The bill alleged that the said deed was void because made within the extended trust period (R. 3);

That the original trust period continued for 25 years from February 6, 1892, the date of the patent, and the Executive order of November 24, 1916, was made within 25 years from that date (R. 3);

That the trust period had been extended in this case on November 24, 1916, before any attempted conveyance was made (R. 3).

The answer claimed that the trust period began with the approval of the allotment September 16, 1891; that it terminated September 16, 1916; that on September 17, 1916, Tyner and others were vested with a fee-simple estate, with no uses, and could sell the same; that the President's proclamation on November 24, 1916, could not extend the trust or divest this fee-simple estate (R. 10–13).

The District Court held with the contention of the United States and entered a decree cancelling said deed as void and a cloud on the title (R. 14–16).

On appeal the United States Circuit Court of Appeals for the Eighth Circuit reversed this decree, holding in favor of defendant's contention, and ordered the bill dismissed (R. 21–26).

One judge dissented on the ground that the President had the power to extend after the 25-year period (R. 26, 27).

This court granted the petition of the United States for a writ of certiorari to examine into the last judgment, and the case is here.

POINTS.

The following points are insisted on by the petitioner in certiorari:

First, that the trust period extends for 25 years from the date of the trust patent (February 6, 1892), and not from the date of the approval of the allotment (September 16, 1891). The President's order extending the same was therefore issued in this case during the 25-year period.

Second, that even if the trust period runs from the date of allotment the right of the President to extend such trust period continues until the United States conveys the absolute fee simple title to the allottee or his heirs. That any conveyance of, or contract touching, said lands made until such final patent is made, and the allottee thus invested with a fee-simple title, is absolutely null and void.

Third, that the statute does not limit the right of the President to extend said trust period to 25 years from the date of allotment, or certificate of allotment, and that it exists until the United States has by final patent, as provided by said acts, conveyed the fee to the allottee or his heirs. That on November 24, 1916, within 25 years from the date of the trust patent, or certificate of allotment, before any final patent was issued, and before any attempted sale by Claudius Tyner to Suda Reynolds, the extension of the trust period for 10 years was made by Presidential order and was therefore valid.

ARGUMENT.

I.

The decision of the Departments being that the trust period extends for 25 years from the date of the certificate of allotment (trust patent), the same will be followed unless clearly erroneous.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * *

The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *United States* v. *Moore*, 95 U. S. 760, 763.

To the same effect are:

Jacobs v. *Prichard*, 223 U. S. 200, 214.
Louisiana v. *Garfield*, 211 U. S. 70, 76.
United States v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339.

The Department of the Interior has construed said act of 1887 as follows:

> The language of section 5 of the act of 1887 is "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted," etc. Here, clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, "does" shows that the trust period begins to run only upon such issuance. The form of patent both under the acts of 1887 and 1906 reads: "and hereby declares that it does and will hold the land thus allotted," etc. This same idea is further expressed in section 6 of the act of 1887, according citizenship to the allottee, which citizenship is not accorded until after issuance of patent, as shown by the following language: "That upon the completion of said allotments, and the patenting of the lands to

said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been *made* shall have the benefit of and be subject to the laws * * * and every Indian born within the territorial limits of the United States to whom allotments shall have been *made* under the provisions of this act * * * is hereby declared to be a citizen of the United States." Under the act of 1906 the allottee is accorded citizenship only upon the expiration of the trust period and issuance of patent in fee at any time the Secretary of the Interior may be satisfied of the competency of the allottee. Provision is also made in said act, as well as in the act of May 29, 1908, for issuance of patents in fee to the heirs of deceased allottees or their lands may be sold and patent issued to the purchasers. It thus follows that by ruling that an allotment is *made* only upon issuance of trust patent, and that the trust period begins to run only from that date, the allottee or his heirs, may, nevertheless, curtail that period by securing patent in fee. While the act of 1906 does not in terms prescribe the form of trust patent, as does section 5 of the act of 1887, yet the logical and inevitable conclusion is that it was intended by Congress that the provisions of the act of 1906, in respect to the lands of deceased allottees, should supersede those of section 5 in cases where the allotment was made after the said act of 1906. (38 L. D. 559, 561.)

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This construction is concurred in by the Department of Justice in an opinion by Attorney General Miller to the Secretary of the Interior, May 21, 1890:

> The patent to be first issued to the Indian allottee under section 5 of the act of 1887 is not intended to convey to him the title of the United States, but is in the nature of a declaration of a trust in the land or a covenant to stand seized of it to the use of the allottee and his heirs until the time shall have arrived when it shall be deemed proper to put an end to the trust by vesting the legal title in him or his heirs.
>
> The effect of the allotment and declaration of trust are to place the allottee in possession of the land allotted and give him a qualified ownership therein, and the extent to which the allottee is thus restricted as a proprietor remains now to be considered, in so far as necessary to answer the questions submitted. (19 Op. Atty. Gen. 559, 562.)

The President's order of extension also deals with the 25-year period as running from this point of time.

II.

The trust period extends for 25 years from the certificate of allotment (trust patent) and until by execution of the final patent the legal title in fee simple is vested in the Indian allottee or his heirs.

That the word "patent" where first used in the act means certificate of allotment has been settled by this court. *United States* v. *Rickert*, 188 U. S. 432.

This land was originally tribal land. The scheme of the act was to convert the holdings from tribal holdings to individual fee-simple estates.

That the individual Indian was no more competent to own and dispose of these lands than a minor of immature years was recognized. The title therefore was vested in the United States in trust.

The statute made the trust not less than 25 years. The President by Executive order might extend this period of tutelage. He is not limited to 10 years nor to one extension. There is no provision that he shall extend the period within the 25 years or lose his power so to do.

The purpose of this act has been declared by the decision of this Court in *Monson* v. *Simonson*, 231 U. S. 341, 345:

> The act of 1887 was adopted as part of the government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation, with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty, whereby the Indians would be established in individual homes, was careful to avoid investing the

> allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent (*United States* v. *Rickert*, 188 U. S. 432, 436), but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would convey to him by patent the fee, discharged of the trust, and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land.

To the same effect are other decisions of the Federal courts. *United States* v. *Rickert*, 188 U. S. 432; *Hallowell* v. *Commons*, 210 Fed. 793; *Beam* v. *United States*, 162 Fed. 260; *United States* v. *Allen et al.*, 179 Fed. 13.

III.

Other acts of Congress creating trust periods in like cases of conversion of Indian tribal lands into individual estates make the period run from the date of certificate of allotment (trust patent), and not from the approval of the schedule of allotments. Unless the language in this act forbids a like construction the same period would be intended.

Some of these acts are:

Act of March 2, 1889 (Peoria act), 25 Stat. 1013, 1014, which provides that—

> The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor.

And this is reiterated in the patent issued.

Act of March 2, 1895 (Quapaw act), 28 Stat. 876, 907, which contains the proviso—

> That said allotments shall be inalienable for twenty-five years from and after the date of said patents.

Choctaw-Chickasaw act, approved July 1, 1902, 32 Stat. 641, where Congress defined the restricted term in this language:

> (SEC. 12) Homesteads * * * shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.
>
> (SEC. 13) The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.
>
> (SEC. 16) All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein pro-

vided, shall be alienable after issuance of patent, as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent.

Act of July 1, 1902, 32 Stat. 716 (secs. 13, 14, and 15), (Cherokee allotment act), which contains provisions similar to those in the Choctaw-Chickasaw act.

So far from the express direction in other acts of like nature designating the date of the certificate of allotment as the beginning of the trust period of 25 years being an argument in favor of the defendant Reynolds it is directly otherwise.

First. It answers the entire argument that Congress could not be supposed to make this period dependent on the ministerial act of issuing the trust patent, or certificate of allotment, after the schedule had been approved. It demonstrates that Congress had done the very thing in many cases.

Second. The act of March 3, 1887, does not declare that the period of 25 years shall commence with the allotment. The provisions are:

First. The Secretary shall approve the allotment.

Second. He shall then cause patents (certificates of allotment) to issue.

Third. These "patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian," etc.; and "at the expiration of said period the United States will convey the same by patent to said Indian," etc.

No title or duty of holding of said land in trust goes to the United States until this trust patent or certificate of allotment issues. The making of the allotment is not complete until this certificate is issued.

Clearly, there is no reason to construe the 25 years as running in this case from any period other than that fixed in all other cases, *i. e.*, 25 years from date of the trust patent, or certificate of allotment.

IV.

The President has the right to extend the trust period at any time until the United States has surrendered its trust by conveying the absolute fee-simple title to the Indian allottee or his heirs.

The act of Congress of February 8, 1887, in effect declares the allottee incapable of taking the legal title to and of exercising power of disposition of, or of contract concerning, his allotment. The period of such disability is fixed at not less than 25 years, and to such further time as the President by Executive order may extend.

The method by which such allottee (or his heirs) were to be placed in full ownership and control of the allotment was through the execution of the final fee-simple patent by the United States.

The act could have made the title vest under the original trust patent on the expiration of the trust period. It did not do this, but, instead, provided "that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust

and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period."

The effect of this act is therefore to leave the title in the United States, and the trust in existence, until the fee-simple patent is executed and title by it vested in the allottee or his heirs; and the President, until such transfer of the title, can carry out the Congressional direction to exercise the discretion of extending the trust period and withholding the conveyance in fee.

As was said by this court in the case of *Michigan Land and Lumber Company* v. *Rust*, 168 U. S. 589, 592–593:

> Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Chouteau* v. *Eckhart*, 2 How. 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. sec. 2449; *Frasher* v. *O'Connor*, 115 U. S. 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue

> of the patent, *Bagnell* v. *Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

When the act requires the issuance of a patent to perfect a grant, until such patent is issued the control of Congress over lands allotted to Indians continues. *United States* v. *Rowell*, 243 U. S. 464, 469.

In this case Congress had acted, and in providing for the issuance of the patent at a future date had ordered that if the President in his discretion thought it should be longer withheld it should be done.

Let it be noted that the provision declaring invalid attempted conveyances or contracts, affecting these allotments, are not restrictions upon the power of disposition, of one holding a title to property. In this case no title ever vested, or was to vest, in the allottee until the final patent issued to her. As this Court said in *United States* v. *Rickert*, 188 U. S. 432, 436:

> * * * In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the

> land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

The further language of this case relating to the taxation of these lands clearly shows that the control of the United States under the act of February 8, 1887, continues until the final patent issues; that until such time the Indian has only the right to occupy and cultivate, and is prohibited from attempting to contract or convey. This Court said (p. 437):

> If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship.

If the statutes under which these lands were being converted from tribal to individual ownership had contained no provision for extending the 25-year period of restricted ownership, Congress could by an act passed after the expiration of said 25 years have reimposed conditions on such ownership. *Brader* v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104.

In this case Congress had acted and expressed its general legislative purpose that these Indians should be restricted in ownership for 25 years and so long thereafter as the President considered them still needing such tutelage. The same construction as to the right to act, after the 25-year period had run, should be applied to the President in carrying out the act of Congress, where no intervening rights of third persons exist, as would apply to Congress if acting directly.

V.

The Executive order extending the term of the trust was definite and in accordance with the act of Congress.

The names of all allottees and designation of all allotments of and full description of all trust patents or certificates for the Absentee Shawnee Indians were of record in the Land Department.

The Executive order extended the trust periods of all such allotments as expired in the year 1917 for 10 years, except those of certain designated names.

The act of February 8, 1887, did not prescribe any form to be used or any method to be observed by the President in extending such periods.

The records aforesaid and the order, applicable thereto, showed everything that an enumeration, in the order, of the allottees whose trust periods were extended, could show.

The exclusion of certain persons on said lists, for whom patents were to be issued, shows that the cases were individually considered and acted on.

The action is the equivalent of making a list of those whose trust terms were extended.

VI.

The order does not suspend the acts of Congress permitting sales before the expiration of trust periods on approval of the Secretary of the Interior.

The several acts of Congress permitting Indian allottees to sell, with the approval of the Secretary of the Interior, applies during the original periods of incapacity fixed by acts of Congress as well as during the periods of extended incapacity arising from Executive order.

It is as legitimate to say that this power of sale with the approval of the Department conflicts with the original prohibition of sale and impairs its term as it is to say that there would be a conflict between the exercise of such power during an extended period and the order making such extension.

The President's order simply extends the time period named. It leaves the allottee just as if the

extended period had been originally written into the act.

The provisions for sale with the approval of the Secretary of the Interior create a method whereby in proper cases a sale may be permitted during the period of tutelage, whether continuing under the original term of the act or the additional term provided for by the act through Presidential order.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

ALEX. C. KING,
Solicitor General.

FEBRUARY 1919.

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should be considered on this application, we desire to set out what we think is correct, and briefly point out the fallacies in the brief and statement in support of the petition.

The Facts.

Under this heading the Solicitor General's statement is reasonably accurate as far as it goes. It is in error as to the date the allotment was approved. The correct date is September 16, 1891, instead of September 6, 1891, and the conveyance involved is from an heir instead of the allottee. Moreover, the schedule was deposited with the Commissioner of the General Land Office on September 16, 1891, and not on February 6, 1892; but the patent was not issued until the last date named. And what we object to particularly is that the President extended the trust period for 10 years upon the land involved in this suit by his order of November 24, 1916. We are unwilling to admit that he even attempted to do so.

Wherefore, we think the order relied on should be set out here and it follows in so far as it affects absentee Shawnee lands.

The "Facts" should likewise show that the value of the matter in controversy does not exceed $100 and to be accurate is $90.

With the statement of facts amended as we have suggested there can be no grounds for objection to it.

Question Presented.

We emphatically say the question presented is not "Whether the twenty-five-year trust period provided for in the General Allotment Act of February 8, 1887 (24 Stat. 389), begins to run from the date of the issuance of the so-called trust patent or from the date of the approval of the allotment by the Secretary of the Interior"; but the real question presented is, whether Suda Reynolds has an undivided one-eleventh interest in the land mentioned in this case, worth at most $90.00; and the secondary question is, whether the lands involved in this controversy were held in trust 25 years from the date the allotment was confirmed and approved, or 25 years from the date of the instrument *evidencing the title of the allottee;* because the allotment involved was not made under the Act of 1887, *supra,* strictly speaking; but under and by virtue of the provisions of Article II of the Agreement of 1891 with the Absentee Shawnee Indians. The pertinent part thereof reading as follows:

> "Whereas, certain allotments of land have been heretofore made, and are now being made to said Absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress entitled, 'An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the In-

dians and for other purposes,' approved February 8, 1887, and according to said instructions, other allotments, are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, locations and area, as those heretofore made, *and when made shall be confirmed. When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular,* in the same manner and to the extent provided for in the above-mentioned Act of Congress."

The Act of 1887, it is true, is the basic act; but this Article II is important because it would be impossible to state more clearly or forcibly that title passed with the approval of the allotment. It is true that the Circuit Court of Appeals construed the Act of 1887 alone, and we think construed it correctly; but if this case is to be reviewed the Act of 1891 must be considered.

Reasons for Allowance of Writ.

The Solicitor General as reason for allowance of the writ says that the decision of the Circuit Court of Appeals was by a divided court, which is true as far as it goes; but it did not divide on the question as to when the trust began to run. They all agreed

that the trust period began with the approval of the allotment and that it ended on Sept. 16, 1916; but one of the learned judges expressed the opinion that the President could reimpose the trust, a proposition that was not contended for below, and not now suggested by the petitioner. So there was no division in the Circuit Court of Appeals on any question involved in this application.

Likewise it is asserted that "There are other cases pending in the District Court involving this question" by the Solicitor General. We regret that we are compelled to traverse this statement. There are no cases pending in the District Court calling for a determination of when the trust period expired as to allotments made to Citizen Pottawatomies and Absentee Shawnees with the sole exception of the case of the *United States* v. *C. J. Becker*. This last-named case will be controlled by the rule in the case at bar if it is adverse to the Government; but not, if the Government prevails, because the case at bar involves inherited lands, while the *Becker* case is an original allotment; the case at bar deals with lands that may be covered by the executive order of November 24, 1916, *supra*, while the *Becker* case concerns lands which the order of November 24, 1916, declared to be free from the trust and on which an attempt was made to reimpose the trust by and order issued in January, 1917. So that if the Government wins this case Becker must still litigate his title.

It is further urged that the case is of general and public importance, on the strength of a letter from the Assistant Commissioner of Indian Affairs.

The Assistant Commissioner says that several thousand Indians are affected by the decision of the court below. With this we dissent.

The only people allotted under the Act of 1891, *supra,* were the Citizen Pottawatomies and Absentee Shawnees. The total number of Pottawatomies being 1,489 and Shawnees being 563. However 776 allotments were made under the Act of 1872 but these were not trust allotments but base fees, inalienable without approval by the President and for which no patent of any kind has ever been issued. The annual report of the Superintendent of the Shawnee Indian School, in charge of the Absentee Shawnees and Citizen Pottawatomies, dated June 30, 1916, on file in the Indian Office, shows that there were 190 Citizen Pottawatomies who had not received patents in fee for any part of their allotments and 60 who still held a part of their allotments under trust patent or a total of 250. Of these only 11 were fullbloods.

The same report shows there were 200 Shawnees who had not received patents in fee to any part of their allotments and 33 who had received patents in fee to a part of their allotments or a total of 233 Absentee Shawnees who then had lands that had not wholly passed from governmental control, or a total

of both tribes of 483. A very small part of these were fullbloods and as the Superintendent says, these allottees "were scattered all over the country pursuing various occupations of honor and profit." What part of these were allottees under the Act of 1872 or their heirs is not disclosed and there is no information to be had on this point, that we are aware of.

We have not been able to see the reports for 1917 and 1918. But under the Acts of August 15, 1894 (28 Stat. 286); May 31, 1900 (31 Stat. 221) and May 27, 1902 (32 Stat. 245-275) these Indians had the right to alienate, both original allottees and heirs, and they have been steadily disposing of their lands. Moreover the executive order of November 24, 1916, gave 14 Shawnees and 80 Pottawatomies patents in fee to their allotments, so that it is safe to say that of the 483 persons whose land were under governmental control in 1916, there are now less than 300. And these are not Indians, and are scattered to the four winds, a great part of them have never been within the State of Oklahoma. Never saw their allotments, and the lands are not now, and have never been utilized for any purpose. Moreover many of these do not hold allotments under the trust feature and many are not allottees but heirs.

The substance of the Assistant Commissioner's letter is that the judgment, will, pleasure or conve-

nience of the department should prevail rather than the plain letter of the law.

It is entirely safe to say that Suda Reynolds would never have questioned the correctness of the District Court's decision knowing that she was bound for the costs and expense of an appeal to the Circuit Court of Appeals, win or lose, except for the threat of a criminal prosecution under the provisions of Section 5 of the Act of June 25, 1910 (36 Stat. 855-856); much less incur the financial burden the proceedings here entails.

We therefore respectfully urge that none of the reasons assigned exist—

The case is too insignificant to take the time of the court.

There was no division of opinion in the court below on the question urged.

There are no other cases pending involving the question in this case and the widest view of the question as presented by the petition does not affect any great number of people and therefore it is not of general and public importance.

ANSWER TO THE BRIEF IN SUPPORT OF THE PETITION.

In his brief the Solicitor General lays down two propositions, the first is as follows:

"The decision of the Circuit Court of Appeals reverses the contemporaneous interpretation put upon the Act of 1887 by the executive department in issuing trust patents thereunder and since uniformly adhered to."

The sole s u p p o r t for this proposition, that is cited, is the opinion of the First Assistant Secretary of the Interior in 38 L. D. 559, 561, involving allotments made to Klamath Indians.

This decision was rendered in January, 1910, more than 23 years after the passage of the Act of 1887; so that it seems peculiar to urge it as authority for the proposition contended for. If the department had always held that the trust period began to run with the issuance of the trust patent it is not clear why it should have to hold it anew. Moreover the opinion does not refer to any prior holding in harmony with the view now urged. It expressly refers to a prior decision to the contrary, and says that the rule in the former opinion was right and that the two cases are to be distinguished. And that is cor-

rect. The question in the *Klamath* case was whether the trust patent should be issued under the fifth section of the Act of 1887 or under the Act of May 8, 1906 (34 Stat. 182); while the question in the case mentioned in the *Klamath* decision, was when did the trust period begin to run where no patent was ever issued. The Assistant Secretary uses the following language in closing the opinion cited by the Solicitor General:

> "June 26, 1909, the department rendered decision in the matter of disposal of the residue lands of the Omaha Indians in Nebraska under the Special Acts of August 7, 1882 (22 Stat. 341) and March 3, 1893 (27 Stat. 612, 630). The first-named Act provided, after individual allotments were completed and trust patents issued thereon, for issuance of trust patent to the tribe covering the residue lands in the same form prescribed by Section 5 of the General Act of 1887. Allotments were 'to be made from such residue lands to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of the Act touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common.' The trust patent was not issued to the tribe at the time it was due, but it was never-

theless held in said decision that the trust period expired twenty-five years from the date on which said patent became due." 38 L. D. 559, 561.

The Omaha decision is not published and the *Klamath* decision is the only one that is, and it was rendered in 1910.

The Omaha Acts construed, read as follows:

"*Sec. 6.* That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contracts shall be absolutely null and void. *Provided,* that the law of descent and partition in force in said state shall apply thereto after patents therefor have been executed and delivered."

Sec. 7 is the citizenship section.

"*Sec. 8.* That the residue of lands lying east of said right-of-way of the Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this Act provided, shall be patented to the said Omaha Tribe of Indians which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of said Omaha Tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha Tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever. *Provided,* that from the residue lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity, and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this Act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common." (22 Stat. 341.)

The allotments provided for in Section 5 were made and trust patents issued as usual, that is sometime after the schedule was approved and the patents ordered issued.

The patent to the tribe for residue lands was not issued and allotments to children were not made as provided in Section 8. Afterwards further legislation was enacted, to-wit:

> "That the Act of Congress approved August seventh, eighteen hundred and eighty-two, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha Tribe of Indians in the State of Nebraska, and for other purposes' be, and the same is hereby amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said Act, and now living, etc. * * * *Provided,* that the allotments so made shall be subject to the same conditions, restrictions, and limitations, provided for in Sections six, seven and eight of said Act touching allotments and patents to allottees therein mentioned."

These last allotments were made and it became necessary to prepare a special form of patent for it was evident that the trust period would not run for 25 years unless the settled construction and interpretation of the language declaring the trust could not be avoided. Thus the question when the trust period began to run became instantly important. The Secretary held unequivocally that the tribal trust period

began, *eo instanti,* with the individual trust created by the original allotment, and that both began with the approval of the schedule, and not 25 years from the date of the trust patents issued to the allottees.

This is not all, for the President of the United States is a part of the executive department, to say the least, and the President said, as to the very land involved, in his proclamation of Sept. 18, 1891, opening the ceded lands to settlement that:

> "Whereas, allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively, * * * " (27 Stat. 980-2.)

This proclamation was prepared, as are all such proclamations, by the Interior Department and by the Indian Bureau and the Land Office thereof. It bears Secretary Noble's signature and is just two days after the approval of the schedule. The President, the Secretary, the Commissioners of both the Land Office and the Indian Bureau, as well as every person connected therewith, well knew that the physical act of preparing the patents and recording the same, had not been done and could not possibly have been done; but they all, in common with every person

who has had occasion to come in contact with the matter of allotments, knew that as a matter of law the order approving the allotment schedule and directing the patent to issue was equivalent to the issue; that no matter when actually issued the patent related back to the date of approval, and as a matter of law the trust period began to run from the approval.

Moreover, the Secretary of the Interior has for many years published an annual report which contains a tabulated statement showing when the allotments to various tribes were made and in each, including 1917, it is stated that these allotments were made in 1891.

So that the proposition falls on the record because the "contemporaneous interpretation" put on the Act of 1887 by the Executive Department is that of the Circuit Court of Appeals.

The second proposition is that:

"The uniform interpretation by the Interior Department is clearly right."

This proposition like the first is based on false premises. For more than 23 years after the passage of the Act of 1887 the interpretation of the department was that adopted by the Circuit Court of Appeals.

15

The argument says that the provision of the act requiring patents to be issued declaring the trust is not self-executing and prior to the actual issuance of the trust patent there is no declaration of trust. That the approval of the schedule is not a declaration that the United States will hold the title for the benefit of the allottee, for the Secretary is not empowered to issue the patent or declare the trust. That Section 450 of the Revised Statutes contains the authority to issue the patent. That Congress provided the terms of the trust and left it to the President to declare it.

This is novel doctrine for the Attorney Generals' office. No authority is cited and if the opinions of Attorney General Garland and his successors for many years are consulted it will be discovered that the Attorney General has uniformly held that there is no authority for the issuance of a patent to an Indian allotment outside of the Act authorizing the allotment. Witness the allotments to Citizen Pottawatomie and Absentee Shawnee under the Act May 1, 1873, the 776 mentioned *supra* and to whom no patent has ever issued and none can be until authority is given by Congress or the Attorney General changes this view. Moreover the statute reads, "He (the Secretary of the Interior) shall cause patents to issue, etc."

The presidential power is covered by the first section of the Act of 1887 and he determines when allotments are to be made and the 5th section places the duty and authority to issue patent in the Secretary alone. The correct statement is that Congress declared the trust to vest on the happening of a contingency, to-wit: the approval of the allotment.

It is further argued that the Circuit Court of Appeals relied on two propositions in arriving at the conclusion reached: *First,* That the right of the allottee in the land became vested upon the approval of her allotment, and the issuance of a patent therefor was merely a ministerial act; and *second,* that whenever Congress desires to make the trust period begin with the date of the patent or certificate of allotment, it expressly says so.

The first is dismissed with the assertion that it is "unimportant" because the shortening or extension of the trust period does not affect the vested right of the allottee. Who then is affected? It is true that Congress has the power to extend or provide for the ending of the trust and no right is granted by allotment that impairs the constitutional power of Congress with respect to Indian lands; but that it does not affect the vested right of the allottee under the Act of 1887 to hold that the beginning of the term of the trust is dependent on the convenience

of the clerks of the land office is not supported by authority or reason.

It is also suggested that because the law of descent and distribution does not apply until the trust patent issues that an inherited estate is not conferred merely by approval of allotment. The intent can be clearly seen by the act. The heirs inherit before issuance but after patent issued all persons entitled under the statutes of distribution take, including estate of curtesy and dower. And it is true that literally thousands of allotments have been sold by heirs and the deeds approved by the department where the allottee died before patent; probably one-fifth of the Yanktonai Sioux allotments were so sold. So that we cannot see the force of this argument. And finally the case of the *United States* v. *Rowell*, 243 U. S. 464 is said to be directly in point. Perhaps so, but not in support of the contention of petitioner. The *Rowell* case is a strong case in support of the rule that the Supreme Court will give effect to the intention of Congress.

There is another rule that the decision of the Supreme Court establishes beyond all doubt, and that is, where agreements have been made with Indians these will be interpreted to effectuate the understanding of the dependent people parties thereto. Can it be honestly urged that the Stella Washington and other Absentee Shawnees had any intimation that

the date when they would own their lands in fee simple was dependent on the ability of the clerical force of the Land office or Indian Bureau? Or as put by the Acting Commissioner of Indian Affairs, in his letter quoted in the petitioner's brief, on "various reasons," or did they understand that the agreement meant what it said and that

> "When said allotments shall be so confirmed and approved by the Secretary of the Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned Act of Congress." (Act of 1887.)

We think there can be no doubt about the meaning of the Agreement or the Act, much less the intention of Congress.

The second proposition that the Circuit Court of Appeals relied on to-wit: that where "Congress desires to make the trust period begin with the date of patent or certificate of allotment, it expressly says so," is disposed of by the assertion that the statutes cited by the court "are not statutes relating to allotments to be held in trust for the Indians under trust patents."

In this assertion the petitioner again is unfortunate. The opinion of the Circuit Court of Appeals cites the Act of March 2, 1889 (25 Stats. 1013) covering allotments to P e o r i a s, Miamis and others.

These Indians were expressly excluded from the operation of the Act of 1887 by the 8th Section; but the Act of March 2, 1889, expressly extended the provisions of the Act of 1887 over them except the 6th or Citizenship Section of the Act of 1887, and the allotment patent issued was a trust patent exactly like the one issued except the provision as to alienation, etc., recites that period begins with the date of the patent.

The Act of March 3, 1885 (23 Stat. 340) covers allotments on the Umatilla Reservation and the trust period feature is in the identical language of the 5th section of the Act of 1887, but further along in Section 2 of the Act the following appears:

> "And if any conveyance is made of the lands set apart and allotted as herein provided, or any contracts made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract or lien shall be absolutely null and void."

The context shows that the patent here referred to is the fee simple patent. Hence we say that the petitioner's assertion is at least unfortunate. And the Circuit Court of Appeals was right.

When Congress desired the date of the trust patent to govern it has so said.

Conclusion.

The writ should be denied:

1. Because the matter involved aside from costs is insignificant.
2. Because no question of public and general interest is involved.
3. Because the decision of the Circuit Court of Appeals is right and the rights of the allottees, the right of heirs, and of the state to tax the land cannot be made contingent on the "various reasons" of the Indian Bureau.

Respectfully submitted,

JESSE D. LYDICK,
Shawnee, Okla.
Attorney for Defendant.

Sept., 1918.

Office Supreme Court, U.
FILED
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JAMES D. MAHER,
CLERK

No. 691.

In the

Supreme Court of the United States.

October Term, 1918.

THE UNITED STATES OF AMERICA, - *Petitioner,*

VERSUS

SUDA REYNOLDS, - - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

MARK GOODE,
HAL JOHNSON,
JESSE D. LYDICK,
Solicitors for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 591.

THE UNITED STATES OF AMERICA, - *Petitioner,*

vs.

SUDA REYNOLDS, - - - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* RESPONDENT.

We have been furnished with a carbon copy of the petitioner's brief, "subject to change," that it proposes to file in this cause. The statement of the case as made therein appears to be correct, and likewise the issues contested in the case below have been fairly stated with the possible exception that it was earnestly urged on behalf of the respondent that even though the presidential order was made in apt time it had no application to the lands involved in this controversy because they are inherited lands

and are not within the purview of the presidential order. Hence we will omit any further statement of the case.

The petitioner in the copy of the brief furnished us insists upon three points, setting them out in full. They are substantially:

First. The trust begins from the date of the trust patent.

Second. That if the trust does not run from that date the right of the President to extend such trust continues until the United States conveys absolute title to the allottee or his heirs, and that any contract or conveyance made prior to the issuance of final patent is void.

Third. That the statute does not limit the right of the President to extend such trust period to twenty-five years from the date of allotment, and that it exists until the final patent issues.

ARGUMENT:

In the "Brief of Argument" the petitioner sets out six propositions on which it relies to establish the points insisted upon, and we desire to notice them in their order. But it is proper to say we have only a carbon copy of the brief proposed to be filed "subject to change," and therefore we may not follow petitioner's argument as it is finally made in its printed briefs.

I.

The decision of the Department being that the trust period extends for twenty-five years from the date of the certificate of allotment (trust patent), the same will be followed unless clearly erroneous.

We have no quarrel with this proposition of law. We admit that it is the rule and a sound one, but we are certain that this rule does not apply in this case, because the Executive Department has held both ways, and the great majority of rulings are contrary to the one relied on in this record, and we think that the rule announced by the Circuit Court of Appeals is in harmony with the contemporaneous construction placed upon the act by the Department.

The first construction of the act appears in the proclamation of the President opening the surplus

lands to homestead entry, which is dated September 18, 1891, and reads in part as follows:

> "*Whereas,* allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, and the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively * * * " (27 Stat. 980-2.)

This proclamation was prepared, as are all such proclamations, by the Interior Department and by the Indian bureau and the land office thereof. It bears Secretary Noble's signature and is just two days after the approval of the schedule. The President, the Secretary, the Commissioners of both the land office and the Indian bureau, as well as every person connected therewith, well knew that the physical act of preparing the patents and recording the same, had not been done and could not possibly have been done; but they all, in common with every person who has had occasion to come in contact with the matter of allotments, thought that as a matter of law the order approving the allotment schedule and directing the patent to issue was equivalent to the issue; that no matter when actually issued the patent related back to the date of approval, and as a matter of law the trust period began to run from the approval.

Moreover, the Secretary of the Interior has for many years published an annual report which contains a tabulated statement showing when the allotments to various tribes were made, and in each, including 1917, it is stated that these allotments were made in 1891.

We cannot here cite the decisions of the Department holding to our view for they are not published and appear only in the files of the Indian office, but the writer of this brief is safe in saying that the Indian office, many times, prior to 1910, has stated the law to be just as we contend it to be. The question was constantly arising by direct inquiry and there was never any deviation from the rule. However, we have one example before us of great importance. It does not construe the Act of 1887 but it does construe another very similar provision. We quote the pertinent parts of the correspondence verbatim:

"Land

7556-1896 DEPARTMENT OF THE INTERIOR C.F.L.

Office of Indian Affairs

The Honorable

The Secretary of the Interior:

Sir: The third article of the agreement concluded with the Sac and Fox Nation of Indians, in Oklahoma, June 12, 1890, ratified and con-

firmed by the Act of February 13, 1891, (26 Stats. 749), contains the following stipulation:

> 'It is further agreed that when the allotments to the citizens of the Sac and Fox Nation are made, the Secretary of the Interior shall cause patents to issue therefor in the names of the allottees which patent shall be of the legal effect and declare that eighty (80) acres of land to be designated and described by the allottee, his or her agent as above provided, at the time the allotment is being made, shall be held in trust by the United States of America for the period of twenty-five years, for the sole use and benefit of the allottee, or his or her heirs, according to the laws of the State or Territory where the land is located; and that the other eighty (80) acres shall be so held in trust by the United States of America for the period of five (5) years, or if the President of the United States will consent, for fifteen (15) years for like use and benefit; and at the expiration of said periods respectively the United States will convey the same by patent to said allottee or his or her heirs aforesaid, in fee discharged of said trust and free from all incumbrances . . . .'

The allotments to the Sac and Fox Indians were approved by the Secretary of the Interior, September 4, 1891, and patents issued September 11, 1891.

The five-year trust period will therefore expire on the 3rd day of September next."

The Commissioner then sets out the fact that the tribe had petitioned for an extension of the five-year periods to fifteen and that the agent likewise recommended compliance with the petitioners' request, and concludes as follows:

> "I therefore have the honor to recommend that the President be asked to extend the trust period of five years in the allotments made to the Sac and Fox Indians for ten years, so that said period will expire on the 3rd day of September, 1906.
>
> Very respectfully,
>
> Your obedient servant,
>
> D. M. Browning,
>
> (Allen) P. Commissioner."

The above letter appears to have been transmitted to the President by the Secretary of the Interior and we set out the Secretary's letter with all endorsements thereon in full:

> "DEPARTMENT OF THE INTERIOR JTB
>
> NCP Washington, March 9, 1891.
>
> The President:
>
> In the inclosed letter dated the 4th instant the Commissioner of Indian Affairs states that the trust period named in certain patents issued for portions of the lands allotted to the Sac and Foxes of the Mississippi in Oklahoma, under the third article of the agreement with them of June 12, 1890, confirmed by the Act of Congress ap-

DEPARTMENT OF THE INTERIOR

August 25, 1906.

In accordance with the recommendation of the Commissioner of Indian Affairs this schedule is respectfully submitted to the President with the recommendation that he extend the trust period in each instance until and including September 3, 1916, as authorized by the Act of Congress approved June 21, 1906.

Thos. Ryan, Acting Secretary.

ESW

WHITE HOUSE, August 28, 1906.

By virtue of the authority conferred by the Act of Congress approved June 21, 1906, the trust period during which the lands described in the foregoing schedule are held in trust by the United States is hereby extended until and including September 3, 1916.

THEODORE ROOSEVELT."

The sole support for plaintiff's contention on this point, that is cited, is the opinion of the First Assistant Secretary of the Interior in 38 L. D. 559, 561, involving allotments made to Klamath Indians.

This decision was rendered in January, 1910, more than 23 years after the passage of the Act of 1887; so that it seems peculiar to urge it as authority for the proposition contended for. If the department had always held that the trust period began to run with the issuance of the trust patent it is not

clear why it should have to hold it anew. Moreover the opinion does not refer to any prior holding in harmony with the view now urged. It expressly refers to a prior decision to the contrary, and says that the rule in the former opinion was right and that the two cases are distinguished. And that is correct. The question in the *Klamath* case was whether the trust patent should be issued under the fifth section of the Act of 1887 or under the Act of May 8, 1906 (34 Stat. 182); while the question in the case mentioned in the *Klamath* decision, was when did the trust period begin to run where no patent was ever issued although one was contemplated and the Act was that of 1887. The Assistant Secretary uses the following language in closing the opinion cited by the Solicitor General:

> "June 26, 1909, the department rendered decision in the matter of disposal of the residue lands of the Omaha Indians in Nebraska under the Special Acts of August 7, 1882 (22 Stat. 341) and March 3, 1893 (27 Stat. 612, 630). The first-named act provided, after individual allotments were completed and trust patents issued thereon, for issuance of trust patent to the tribe covering the residue lands in the same form prescribed by Section 5 of the General Act of 1887. Allotments were 'to be made from such residue lands to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust

by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of the act touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein issued to the tribe in common.' The trust patent was not issued to the tribe at the time it was due but it was nevertheless held in said decision that the trust period expired twenty-five years from the date on which said patent became due." 38 L. D. 561.

The *Omaha* decision is not published and the *Klamath* decision is the only one that is, and it was rendered in 1910.

The slightest consideration of the *Klamath* case shows the real question was the time when citizenship should vest. If under the original Act of 1887 this would take place when trust patent issued, if under the Act of 1906 when the simple patent issued.

Wherefore, we think it only fair to conclude that the contemporaneous decisions of the department charged with the duty of administering the law, is in harmony with the rule announced by the Circuit Court of Appeals, and that its decision in the instant case was right.

II.

The trust period extends for twenty-five years from the certificate of allotment (trust patent) and until by execution of final patent the legal title in fee simple is vested in the Indian allottee or his heirs.

The respondent thinks the correct rule is that

The trust period began September 16, 1891, and expired September 16, 1916.

The Shawnees were allotted under an agreement. The pertinent part is to be found in a portiton of article II reading as follows:

> "*Whereas,* certain allotments of land have been heretofore made, and are now being made to said absentee Shawnees according to instructions from the Department of the Interior, at Washington, under Act of Congress entitled, 'An Act to provide for the allotment of lands, in severalty, to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians and for other purposes,' approved February 8, 1887, and according to said instructions, other allotments, are to be made, it is further agreed that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, locations and area, as those heretofore made, and when made shall be confirmed, and approved by the Secretary of the

Interior, the title in each allottee shall be evidenced and protected in every particular, in the same manner and to the extent provided for in the above-mentioned Act of Congress." Act of March 3, 1891, (26 Stats. 1019.)

As stated, the contention in the court below centered on the proper construction to be given to the fifth section of the Act of 1887. It reads as follows:

"*Sec. 5.* That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

> "*Provided,* that the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided." Act Feb. 8, 1887 (24 Stat. L. 388).

It is admitted in the bill and it is conceded by all parties that the Stella Washington allotment was approved on the 16th day of September, 1891, her name appearing on the schedule approved on that date. President HARRISON proclaimed to the world that she was so allotted in his proclamation opening the surplus lands to homestead entry dated September 18, 1891, in the following language:

> "*Whereas,* allotments of land in severalty to said Sac and Fox Nations, said Iowa Tribe, said Citizen Band of Pottawatomies, and the said Absentee Shawnee Indians have been made and approved, and provisional patents issued therefor, in accordance with law and the provisions of the before-mentioned agreement with them respectively, * * * " (27 Stat. 980-2.)

It is true that the provisional or trust patent did not actually issue until February 6, 1892, or perhaps more correctly speaking it was dated as of that date, but it is likewise true that Stella Washington's right to a preliminary patent vested on the instant her allotment was approved. Her equitable title was then

complete and did not depend upon the delivery of the trust patent.

—*Ballinger* v. *Frost*, 216 U. S. 240, 54 L. ed. 464.

By the very terms of the approval the patent was ordered issued positively and unequivocally. No reservation was made and no discretion was vested in any one after that, and the duty to issue thereupon became purely ministerial. Delay in issuing, or failure to issue such patent thereafter could not postpone or defeat the vesting of the equitable interest in Stella Washington, nor could it postpone the beginning of the trust period. Not only did the approval of the Secretary contain an absolute order for the issue; but the act itself is mandatory. It reads: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, *he shall cause* patents to issue therefor in the names of the allottees," etc. No discretion is lodged anywhere with regard to issuance of the trust patents.

It therefore follows that the trust began to run with the approval. However, it makes no difference whether we say the trust was created by the patent for it would relate back to the approval; but we hardly think it can be said that the trust is created by the patent for it might well be that the issue of a patent in a given case could be overlooked for

years, and this has actually occurred, and could it then be said that no trust was created because someone forgot to write out and record the patent?

The record shows and it is admitted by all parties that the allottee performed every condition, thing or act, provided for by the statute or within the purview thereof, and that, likewise, the United States, through its proper officers, has done every act with respect to this allotment that is provided for in any act applicable to the case, except to issue a fee simple patent, and there is no suggestion in the act, in the decisions of the Department, or in its custom or practice, to the effect that any discretion is lodged in the Executive Department, or any officer thereof, in the premises. Wherefore, Stella Washington obtained a vested interest in the land when her allotment was approved on September 16, 1891, and by operation of law the right to convey passed to her heirs on September 16, 1916.

—*Ballinger* v. *Frost,* 216 U. S. 241, 54 L. ed. 464;

Simmons v. *Wagner,* 101 U. S. 260, 125 L. ed. 910;

Wood v. *Gleason,* 43 Okla. 9, 150 Pac. 418;

Godfrey v. *Iowa Land & Trust Company,* 21 Okla. 293, 91 Pac. 792.

III.

The Acts of Congress creating trust periods in like cases of conversion of Indian tribal lands into individual estates makes the period run from the date of certificate of allotment (trust patent) and not from the approval of the schedule of allotments. Unless the language in this act forbids a like construction the same period would be intended.

We apprehend the rule to be that Congress or any other legislative body expects the court to construe its acts in accordance with the plain unambiguous meaning of the words used in framing the same. The sum and substance of the petitioner's argument under this head is, that because Congress provided specifically in several acts that trust periods should run from the date of the allotment the same rule should be applied as to allotments under the Act of 1887, although it would be difficult to use language that would indicate any more clearly than the fifth section of said act shows it to be the intention of Congress that such period should begin from the approval of the allotment. Moreover, it is the universal rule, we think, of construction, that a patent or a certificate of allotment, when issued, relates back to the date when it was due to be issued, and that Congress in providing in several acts for a different rule, well understood the doctrine of relation. We

think the true rule is that whenever Congress intended that the trust period should begin to run from the date of patent it has never failed to say so. The Act of 1887 provides that upon the approval of the allotments the Secretary *shall*—not sometime afterwards—not when the clerks in the land office get time —or when it may be convenient—but *eo instante*, upon the approval. The agreement provides that when made they shall be confirmed and approved and the title shall be evidenced in the same manner —not that they will at some future time—not whenever the business of the land office will permit—or not that the title shall be evidenced if the Secretary directs the same to be done at some future date, but *when* the very moment, *eo instante*, the allotments are approved.

IV.

The President has the right to extend the trust period at any time until the United States has surrendered its trust by conveying the absolute fee simple title to the Indian allottee or to his heirs.

The petitioner argues that the effect of the act is to leave the title in the United States and the trust in existence until the fee simple patent is executed and title by it vested in the allottee or his heirs.

We are unable to comprehend this argument. The act in express terms limits the trust period to twenty-five years—from some time, at any rate, but petitioner contends that if the Executive Department should refuse to issue the fee simple patent, the trust period would continue forever. It cannot be denied that the argument of the petitioner is in effect that Congress did not mean to limit the trust period for twenty-five years, or, if it did, it failed to do so, for its argument is clear and the assertion is made that the trust period will continue from the date of the trust patent unto infinity, if in the meantime a fee simple patent is not issued. This argument and this proposition is answered so clearly and so fairly by the Acts of Congress that the mere statement of the proposition is, to our minds sufficient, to condemn it. *First*, the Act of 1887 provides for a twenty-five year period, not for an indefinite one; *second*, the same act provides that the President may extend—not an indefinite period—but the definite period of twenty-five years; *lastly*, the Act of 1906, expressly says that the power of extension shall be exercised prior to the expiration of the twenty-five year period. And again the fifth section of the Act of 1887 provides that conveyances only that are made during the twenty-five year period shall be void. Thus clearly indicating that conveyances made after that period are legal

We are not unmindful of the fact that the Supreme Court has held that the legal title does not pass where the Act of Congress provides for the issuance of a patent to convey title to the land, but in the instant case it is unfair to say that no title was in the allottee upon the approval. He obtained something, and in addition the solemn covenant of the nation that when the twenty-five year period passed the whole title to the land should inure to him. Otherwise an immense fraud was practiced upon the wards of the nation by those purporting to serve them. And again, we are of the opinion that where the twenty-five year period expires and no final patent is issued the rule must be that the full equitable title passes at the expiration of the period, and nothing but the bare legal title remains in the United States. It has no power of disposition and can only convey said land to the allottee, and all the restrictions against conveyance on the part of the allottee having expired by operation of law, his deed is good.

Under this head the petitioner argues that Congress could by an act passed after the expiration of the trust, reimpose the same, and that this rule should be applied to the President where no intervening rights of third persons exist. We have always presumed that the President executed the law, and did not create it. Likewise we have assumed that Congress under the Constitution was given plenary pow-

er to control trade and intercourse with Indians, and have never before seen it suggested that the President is likewise endowed with the same authority. If the argument of the petitioner is correct an executive order is sufficient authority for any act that may be done with reference to Indian affairs and Congress usurps his prerogative when it makes laws concerning them.

V.

The executive order extending the time of the trust was definite and in accordance with the Act of Congress.

VI.

The order does not suspend the Act of Congress permitting sales before the expiration of the trust period upon the approval of the Secretary of the Interior.

From these statements we are compelled to dissent and will endeavor to show that instead of being definite it is exceedingly indefinite and moreover that it is not in accordance with the act, and does not even purport to cover the lands involved in this case.

The order purports to be under authority of the said fifth section and must be founded upon that, or the provision appearing in the Act of June 21, 1906, and in either event it is without effect because:

(a) The order by its terms applies only to lands on which the trust expired in 1917, and

(b) There is no intimation in the order that it was intended to cover inherited lands and Congress has clearly indicated by a long series of acts that as to such lands the trust period shall not be extended.

The language of the 5th section in respect to the power to enlarge the trust period is as follows:

> "*Provided*, That the President of the United States may in any case *extend* the period."

The only other act conferring any power on the President to extend the trust period reads as follows:

> "Prior to the expiration of the trust period of any Indian allottee, to whom a trust or other patent, containing restrictions upon alienation, has been or shall be issued under any law or treaty, the President may in his discretion continue such restrictions on alienation for such period as he may deem best. *Provided*, however, that this shall not apply to lands in the Indian Territory."
>
> —Act of June 21, 1906 (34 Stat. L. 326).

These are the only provisions on the subject. The first says *extend* and the last says, "Prior to the expiration of the trust period."

If the latter does not amend or affect the first it certainly makes clear the intention of Congress that any change in the trust period must be made before it expires. It is manifest that neither was intended to give authority to reimpose a trust.

We think we have conclusively shown that the trust began on September 16, 1891, and if so it ended September 16, 1916. For convenience we here set out the order in full, except the numbers and names of the Pottawatomies:

> "It is hereby ordered, under authority contained in section 5 of the Act of February 8, 1887 (24 Stat. L. 388-389), that the trust periods on the allotments of the Absentee Shawnee and Citizen Pottawatomie Indians in Oklahoma, which trust expires during the calendar year, 1917, be, and is hereby, extended for a period of ten years from the dates of expiration, with the exception of the following:
>
> *Absentee Shawnee Tribe.*

Allot. No.	
128	Alford, Alaric
3	Alford, Charles R.
1	Alford, Thomas W.
7	Beaver, Addie
331	Day, George
262	Ellis, Willie
362	Fox, Clarence, or Tah-wah-pea-sca-ca
514	Ellis, Lucinda, or Nay-co-twa-pea-se

148 Hodjo, Billy
52 Than-ah-pea-se, now Morton, Mary
186 Panther, Lilly
496 Sloan, Victor
251 Switch, James
355 Thorp, Frank

Citizen Pottawatomie Tribe

* * * * * * *

The White House,
24 November, 1916, WOODROW WILSON
No. 2494."

This order is in express terms limited to those allotments on "which the trust expires during the calendar year 1917." The trust period as to the land in controversy here expired in 1916. Wherefore this order cannot be held to apply.

The identity of the lands intended to be covered by the order cannot be determined from it. It merely says in a sort of a negative way that the allotments of the Shawnees shall be held in trust for an additional ten years except those owned by certain persons therein named. It surely cannot be construed to cover all the lands so allotted except those identified in the order by the names of the owners, all of whom were then living, because a great part of said lands had long since passed by approved departmental deeds. Moreover other allotments had descended to persons who had been pronounced com-

petent by the Secretary under the Act of May 8, 1906 (34 Stat. 182), and in many instances to persons whose land had been freed of any governmental control. Both of these conditions exist in the case at bar. Mary, Willie and Walter Washington, sister and brothers of the half-blood to Stella Washington, were allotted as Creek quarter bloods, and their lands were, and are, totally free from any restriction whatsoever. While James, another half brother, received a patent in fee to his allotment as a Shawnee, because the Secretary found him competent. These facts do not appear from the record and we only suggest them because it is not an unusual condition, and one of which the Department is fully aware. Moreover the record does show that Stella herself was adjudged competent and received a patent for one-half of her allotment (see exhibit to petitioner's brief in support of the petition for *certiorari*).

So we think it only reasonable to conclude that the order was drawn with these not uncommon and natural conditions in mind and therefore it intended to extend the period as to the lands of the allottees only then alive and not as to allotments acquired by inheritance. We can conceive of no other reasonable construction.

Very soon after Stella Washington was allotted Congress clearly indicated that it intended that the

trust period as to absentee Shawnee allotments should be terminated before the 25-year period expired. In 1894, less than three years after allotment, there was incorporated in the Indian appropriation bill the following proviso:

> "*Provided*, that any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the act approved February eighth, eighteen hundred and eighty-seven (twenty-fourth statutes, three hundred and eighty-eight), and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another state or territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named."

This provision was extended and broadened by the Act of May 31, 1900 (31 Stat. L. 221), section seven thereof reading as follows:

> "That the proviso to the act approved August fifteenth, eighteen hundred and ninety-four,

permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit the *adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands then such minors may join in a sale thereof by a guardian,* duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior; and any Citizen Pottawatomie or Absentee Shawnee not residing upon his allotment, but being an actual resident of another state or territory, may in like manner sell and convey all the land allotted to him."

And indeed, a short time thereafter Congress reversed its policy with respect to all allotments where the same were inherited, by enacting a general provision applicable to all trust lands wherever situated.

Section 7, of the Act of May 27, 1902, reads:

"That the adult heirs of any deceased Indian, to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by

the proper court upon the order of such court, made upon petition filed by such guardian, but all such conveyances shall be subject to approval by the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon alienation had been issued to the allottee." (32 Stat. L. 245-275.)

The next enactment is not applicable to this case but as it is an amendment to the Act of 1887, it clearly shows the congressional intent as to inherited lands. The last paragraph of the Act of May 8, 1906, reads as follows:

> "That hereafter when an allotment of land is made to any Indian and any such Indian dies before the expiration of the trust period, said allotment shall be canceled and the land shall revert to the United States and the Secretary of the Interior *shall* ascertain the legal heirs of such Indian and *shall cause* to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers and pay the net proceeds to the heirs," etc. (34 Stat. 183.)

Likewise the Act of May 29, 1908, does not apply to this particular allotment but the policy of Congress looms clearly on reading this part thereof:

> "That when an Indian who has heretofore

> received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs *shall* cause to be issued in their names a patent in fee simple for said lands, but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided," etc.

The Act of June 25, 1910 (36 Stat. L. 855), does apply and practically reiterates the provision of the Act of May 29, 1908 *(supra)*, and the Act of May 18, 1916 (38 Stat. ....), authorizing partition of inherited lands, whether the heirs are competent or not, repeats the same provision as to competents and authorizes the issuance of trust patents to the incompetents but expressly limits the trust period to expire in accordance with the original trust period, meaning twenty-five years from the date of the beginning of the original period.

These acts show clearly, that Congress first withdrew from the President the power to enlarge the trust period as to lands inherited from allottees as expressed in the 5th section whereby an extension was possible in any case, by providing for sale, etc.; and, finally to make the purpose clear enacted the provision appearing in the Act of June 21, 1906, *supra,* which specifically limits this power to be ex-

ercised "prior to the expiration of the trust period." If this act amends the provision appearing in the Act of 1887 then there can be no question about this case.

At any rate it is clear from a perusal of these acts that it is the intention of Congress, and therefore the policy of the Government, to end the trust period upon all allotments prior to the date fixed by the allotment acts, upon the death of the allottee, either by patent or by sale. True, a conveyance by such heirs, before the expiration of the trust, would not convey title until approved by the Secretary of the Interior; but it is certainly true that the Secretary's approval goes merely to the adequacy of the consideration and he has no authority to arbitrarily withhold his approval when such heirs seek to convey. If he has such power the effect would be that instead of authorizing the heirs to convey, the Secretary is authorized to convey, and this cannot be the law.

Conclusion.

We have attempted to show, and we think we have shown beyond peradventure that the trust period began to run on September 16, 1891, and that it expired September 16, 1916, so that from that date there was no express trust in existence unless it was reimposed by the presidential order of November 24,

1916. We think, likewise, that we have established the futility of that order beyond peradventure. But it is argued that the title was in the United States during the trust and that the fee was to be conveyed by patent and this not having been done the fee remained in the United States and hence no title could be conveyed by the allottee. Those urging this theory are extremely careful to refrain from expressing an opinion as to what the allottee has in the way of estate in the land after the expiration of the period. There are obviously but two answers either of which damns the theory beyond redemption. It is clear the trust was a covenant to stand seized to the use of the Indian for 25 years. At the end of that time this ceases, and the Indian loses the benefit conferred, loses every vestige of right, title, or interest, or he acquires the full equitable title with full power to convey. If the first, the title cannot vest in him again until Congress acts because the Executive Department of the Government, cannot convey away public land except in obedience to a plain mandate of Congress expressed in an Act of Congress. So if the title does not pass automatically with the expiration of the trust period it can never pass until Congress acts, and the Indian has absolutely less at the end of his probationary period than before. He loses the use, the title remains in the Government freed from the trust and the allottee

has absolutely nothing. This is the only deduction that can be drawn from the non-executing theory. In all moderation it is unreasonable, if not absurd.

If the full equitable title only passed, and not the fee, automatically, with the termination of the trust, then, of course, the allottee has the right to convey and his deed is good. But we think that the Act of 1887 in its own terms answers every question and provides that the title passed automatically and a conveyance by the allottee or his heirs after the termination of the trust is valid.

The covenant of title or interest is expressed in the 5th section of the Act of 1887 in this wise:

> "* * * that the United States does and will hold the lands thus allotted for the *period* of twenty-five years, in trust for the sole use and benefit of the Indian," etc. * * * "and that at the expiration of the said *period* the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee," etc.

If the act stopped at this there might be some ground for argument that until the fee patent issued the title remained in the United States and of course a conveyance thereof could not be made because the language might be construed to mean the title did not pass except by the patent. This construction, however, would destroy that maxim of equity on which the entire doctrine of trusts may be

an indeterminate status in the interim pending the issuance of the trust patent; and, where are the provisions to cover the manifest contingencies that would arise thereunder; and what was the purpose of Congress in leaving so important a matter to the efficiency or inefficiency of departmental clerks who might issue a patent in time or might delay its issuance negligently or intentionally ten, fifteen or twenty years? Why should Congress vest in the President the power to extend such period if a Governmental department or its clerks were delegated power arbitrarily, absolutely, and irremediably, to extend it indefinitely by neglecting or refusing to issue patent?

Congress also intended that title in fee simple should vest at the expiration of said period, and not presuming negligence or delay, presumed that patents in fee would promptly issue as of the date of said expiration. If not, what did Congress intend to do with such lands at the expiration of the trust? Seize them and open them to homestead entry or what? If not, for what purpose did Congress create an indeterminate estate in the interim between the expiration of the trust period and the issuance of the patent in fee that might be continued five, ten, fifteen years or indefinitely through departmental inefficiency? Where has Congress enacted that the trust period should be twenty-five years, provided

however said period may be increased indefinitely at either end by the failure or neglect to issue the trust patent in the beginning or the patent in fee at the end? Why did Congress make no provision for the manifest perplexities and dilemmas that might thus arise? Why, in dealing with Indians, did it create and impose a maze of intricacies and difficulties?

To a mind unbiased by the zeal of argument and unconfused by "wise saws and modern instances," and neglecting those details and those side-lights which seem to the defendant to make his position impregnable, it would seem that these questions alone are susceptible of no reasonable answer, and the solution of the questions presented by the Circuit Court of Appeals is correct and the decision should be affirmed.

Respectfully submitted,

MARK GOODE,
HAL JOHNSON,
JESSE D. LYDICK,
Solicitors for the Respondent.

UNITED STATES *v.* REYNOLDS.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 591. Argued March 4, 5, 1919.—Decided May 19, 1919.

Under the Allotment Act of February 8, 1887, § 5, c. 119, 24 Stat. 388, the twenty-five year trust period, with the attendant restriction upon the right of alienation, runs from the date of the trust patent, and not from the date of the approval of the allotment by the Secretary of the Interior; and an attempt to convey, made by an heir of the allottee, within that period as extended by the President before its expiration, is void. P. 107.

252 Fed. Rep. 65, reversed.

THE case is stated in the opinion.

The Solicitor General for the United States.

Mr. Mark Goode, with whom *Mr. Hal Johnson* and *Mr. Jesse D. Lydick* were on the brief, for respondent, argued, in part, as follows:

It is true that the provisional or trust patent did not actually issue until February 6, 1892, or perhaps more correctly speaking it was dated as of that date, but it is likewise true that Stella Washington's right to a preliminary patent vested on the instant her allotment was approved. Her equitable title was then complete and did not depend upon the delivery of the trust patent. *Ballinger* v. *Frost*, 216 U. S. 240.

By the very terms of the approval the patent was ordered issued positively and unequivocally. No reservation was made and no discretion was vested in any one after that, and the duty to issue thereupon became purely ministerial. Delay in issuing, or failure to issue such patent thereafter could not postpone or defeat the vesting of the equitable interest, nor could it postpone the beginning of the trust period. Not only did the approval of the Secretary contain an absolute order for the issue; but the act itself is mandatory. It reads: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, *he shall cause* patents to issue therefor in the name of the allottees," etc. No discretion is lodged anywhere with regard to issuance of the trust patents.

It therefore follows that the trust began to run with the approval. However, it makes no difference whether we say the trust was created by the patent, for it would relate back to the approval; but we hardly think it can be said that the trust is created by the patent for it might well be that the issue of a patent in a given case could be

overlooked for years, and this has actually occurred, and could it then be said that no trust was created because someone forgot to write out and record the patent?

Stella Washington obtained a vested interest in the land when her allotment was approved on September 16, 1891, and by operation of law the right to convey passed to her heirs on September 16, 1916. *Ballinger* v. *Frost*, 216 U. S. 240; *Simmons* v. *Wagner*, 101 U. S. 260; *Wood* v. *Gleason*, 43 Oklahoma, 9; *Godfrey* v. *Iowa Land & Trust Co.*, 21 Oklahoma, 293.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was a suit brought by the United States in behalf of Claudius Tyner and ten other persons, heirs at law of Stella Washington, deceased, who was a member of the Absentee Shawnee Tribe of Indians of Oklahoma; its object being to cancel a deed made by Tyner to Suda Reynolds on February 17, 1917, purporting to convey an undivided eleventh interest in a tract of land inherited by the eleven heirs from Stella Washington, who was the allottee thereof. The legal title to the tract was held by the United States under a certificate of allotment or "trust patent," dated February 6, 1892, containing a provision that the United States did and would hold the land in question in trust for the said Stella and in case of her death for her heirs, for a period of twenty-five years, at the expiration of which time the United States would convey the same by patent in fee, discharged of the trust, to said Indian or her heirs, unless the trust period had been extended by the President of the United States.

The allotment was made under the provisions of the Act of Congress approved February 8, 1887, c. 119, 24 Stat. 388, as amended by Act of March 3, 1891, c. 543,

26 Stat. 989, 1019. Section 5 of the Act of 1887 provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Stella Washington's allotment was approved by the Secretary September 16, 1891; the allotment certificate or trust patent was issued on February 6, 1892. On November 24, 1916, the President by executive order extended the trust period for ten years. Thereafter, on February 17, 1917, Tyner executed the deed in question to Suda Reynolds.

The first question presented by the record is whether the original trust period extended for twenty-five years from February 6, 1892, the date of the trust patent, or from September 16, 1891, the date of the approval of the allotment. If the former, there is no question that the executive order, being made within the original trust period, was valid (subject to an objection as to its form), and had the effect of extending the trust, with resulting

restriction upon the right of alienation, for the further period of ten years. If, on the other hand, the original trust period should be dated from the approval of the allotment, it still is insisted by the Government that the right of the President to extend the trust period continued beyond the twenty-five years and until the United States surrendered its trust by conveying the absolute fee simple title to the Indian allottee or his heirs.

The District Court sustained the contention of the United States and entered a decree canceling Tyner's deed as void and constituting a cloud upon its title. The Circuit Court of Appeals reversed this decree and directed a dismissal of the bill. 252 Fed. Rep. 65.

The latter decision rests upon the ground that under § 5 of the allotment act the right of the allottee to a preliminary or trust patent became absolute upon the approval of the allotment by the Secretary of the Interior; that her equitable title was then complete, and did not depend upon the delivery of the patent. *Ballinger* v. *Frost*, 216 U. S. 240, was cited in support of this; but it is not entirely apposite. That case turned upon the effect of a certificate of allotment issued under the Choctaw and Chickasaw Agreement (Act of July 1, 1902, c. 1362, 32 Stat. 641, 644), the 23d section of which declared that such certificate should be "conclusive evidence of the right of any allottee to the tract of land described therein." The Indian, being a citizen and resident of the Choctaw Nation duly enrolled and entitled to an allottment, selected as such the land in controversy, upon which were her buildings and improvements; this was received by the Commission to the Five Civilized Tribes, and, after the expiration of nine months, the time prescribed by statute for contest, no contest of her right to the designated allotment having been made, a certificate was issued and delivered to her. This court held the allottee's rights had become fixed, the Secretary of the In-

terior thereafter having nothing but the ministerial duty to perform of seeing that a patent was duly executed and delivered, and upon this ground sustained a judgment awarding a writ of mandamus; citing *Barney* v. *Dolph*, 97 U. S. 652, 656; *Simmons* v. *Wagner*, 101 U. S. 260, 261; *Cornelius* v. *Kessel*, 128 U. S. 456, 461; *Orchard* v. *Alexander*, 157 U. S. 372, 383; and other cases.

The rule established by these cases is familiar. But we do not think it can be applied so as to give finality to the act of the Secretary in approving the allotment under § 5 of the Act of 1887. Nor does that act contain any such declaration of conclusive effect as is found in § 23 of the Choctaw-Chickasaw Agreement. While the matter is not free from doubt, we have reached the conclusion that by the better construction the trust period begins and dates from the issuance of the trust patent and not from the approval of the allotment. The Department distinctly so ruled in *Klamath Allotments*, 38 L. D. 559, 561, where it was said, after quoting the pertinent language of § 5 of the Act of 1887: "Clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, 'does,' shows that the trust period begins to run only upon such issuance." This ruling was made in the year 1910, and may be inconsistent with some previous rulings of the Department, as counsel for respondent insists that it is. Nevertheless it is entitled to weight as an administrative interpretation of the act; it comports with our impression of the natural meaning of the language employed by Congress; and it very probably was relied upon by the President when promulgating the order of November 24, 1916, extending the trust period. This order might as well have been made a few months earlier, had it been supposed that the 25-year period was to expire in September.

This construction of the Act of 1887 puts it in agree-

ment with other acts for the allotment of Indian lands,[1] which, while subsequently passed and perhaps not strictly to be regarded as a legislative interpretation, nevertheless seem to us to indicate the effect that Congress attributed to the Act of 1887.

Some criticism is made by counsel for respondent upon the form of the executive order of November 24, 1916, as being indefinite and not in accordance with the act of Congress. We deem this criticism unfounded, and need spend no time upon it.

Calculating the 25-year period from February 6, 1892, the date of trust patent for the Stella Washington allotment, it expired on February 5, 1917; but the trust was extended for a further term of ten years, and hence the deed made by Claudius Tyner to Suda Reynolds February

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[1] Act of March 2, 1889, c. 422, 25 Stat. 1013, 1014, providing for allotments to Peorias and Miamis, contains this provision: "The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor."

Act of March 2, 1895, c. 188, 28 Stat. 876, 907, (the Quapaw Act) contains this: "*Provided*, That said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents."

Act of July 1, 1902, c. 1362, 32 Stat. 641, 642, (Choctaw-Chickasaw Act) contains the following:

(Sec. 12, relating to homesteads.) "Shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

(Sec. 13.) "The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment."

(Sec. 16.) "All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent."

Cherokee Allotment Act of July 1, 1902, c. 1375, 32 Stat. 716, contains similar language in §§ 13 and 15.

17, 1917, was null and void by the terms of § 5 of the Act of 1887.

As the President's order was made within the original 25-year period, it is unnecessary to consider whether he might have acted with like effect at a later time.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.